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the basis of values external to law or results).

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Images of spirituality in law may be traced to "the prophetic vision of justice" in American legal culture. n270 The desire for spiritual fulfillment fills that vision, moving from the ground up out of the drive for self-alteration and context-transcendence in the pursuit of human flourishing, n271 a pursuit basic to the human character.

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n270. Jules Lobel, Losers, Fools & Prophets: Justice as Struggle, 80 Cornell L. Rev. 1331, 1353 (1995) (claiming that "the prophetic litigator's main contribution is aiding the development of a culture of legal struggle that continually informs and inspires future generations to challenge oppressive practices").

n271. See Martha C. Nussbaum, Human Functioning and Social Justice: In Defense of Aristotelian Essentialism, 20 Pol. Theory 202, 214-23 (1992) (discussing the conditions of human flourishing).

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Transcendence involves more than the self. At bottom, spirituality is tied to the notion of communion and community-building. n272 Without communion with others, the investigation of alternative types of relationships that neither devalue nor exclude race makes no progress. Indeed, the very concept of personhood is contingent on the flourishing of interracial community. n273

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n272. See Paul J. Heald, Idealism and the Individual Woman: Madness and Humanity in Bessie Head's A Question of Power, 5 Tex. J. Women & L. 83, 98-99 (1995).

n273. Jane Baron and Jeffrey Dunoff note: "If the flourishing self is constituted in relation to things and people, then personhood and community are connected; the individual is partly a product of his or her social world." Jane B. Baron & Jeffrey L. Dunoff, Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory, 17 Cardozo L. Rev. 431, 475 (1996).

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[*1100]

The overarching morality of community resides in the general obligation to reconcile competing visions of the common good. This obligation requires lawyers and clients to combat moral disassociation n274 and to eschew narrow self-interest in advocacy. Only a reconstructive morality reconciling individual rights and social responsibilities satisfies that obligation. n275

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n274. See Laurence Mordekhai Thomas, Vessels of Evil: American Slavery and the Holocaust 108-13 (1993).

n275. See Amitai Etzioni, A Moderate Communitarian Proposal, 24 Pol. Theory 155, 161 (1996) (maintaining that "individual rights and social responsibilities, just like individual liberties and social definitions of the common good, are not oppositional but complementary - or at least they can made to be").

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Drawn from the jurisprudence of critical race theory, n276 the reconstructive ethic of race-conscious responsibility reasserts the role of lawyers as custodians of community. n277 This custodial responsibility requires entry into spiritual dialogue with clients and communities to establish respect for conscience in opposing racial animus. n278 Fashioned from an ethic of care n279 increasingly celebrated in ethics regimes, n280 spiritual dialogue brings the potential for compassion n281 and empathy into the play of advocacy. Doubtless forestalling the conversion of caring into coercion or paternalism poses challenges. n282 Institutionalizing the ethic of care in state juridical structures presents even greater challenges. n283

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n276. See Anthony E. Cook, Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr., 103 Harv. L. Rev. 985 (1990).

n277. See Anthony T. Kronman, Precedent and Tradition, 99 Yale L.J. 1029, 1066-67 (1990); see also Anthony T. Kronman, Living in the Law, 54 U. Chi. L. Rev. 835, 873 (1987).

n278. See Thomas L. Shaffer, On Being a Christian and a Lawyer: Law for the Innocent 111-33 (1981); Emily Fowler Hartigan, Multiple Unities in the Law, 36 S. Tex. L. Rev. 999 (1995).

n279. See, e.g., Virginia Held, Feminist Morality: Transforming Culture, Society, and Politics 30-31, 52-54, 168-70 (1993); Justice and Care: Essential Readings in Feminist Ethics (Virginia Held ed., 1995); Nel Noddings, Caring: A Feminine Approach to Ethics & Moral Education (1984); Rosemarie Tong, Feminine and Feminist Ethics 80-107 (1993).

n280. See, e.g., Stephen Ellmann, The Ethic of Care as an Ethic for Lawyers, 81 Geo. L.J. 2665 (1993).

n281. See Anthony E. Cook, The Death of God in American Pragmatism and Realism: Resurrecting the Value of Love in Contemporary Jurisprudence, 82 Geo. L.J. 1431 (1994).

n282. See Carrie Menkel-Meadow, What's Gender Got to Do with it?: The Politics and Morality of an Ethic of Care, 22 N.Y.U. Rev. L. & Soc. Change 265, 285 (1996) (reviewing Joan C. Tronto, Moral Boundaries: A Political Argument for an Ethic of Care (1993)).

n283. See Christopher H. Wellman, Liberalism, Samaritanism, and Political Legitimacy, 25 Phil. & Pub. Aff. 211, 213-14 (1996) (arguing that the

political legitimacy of state imposition upon personal liberty turns not merely on the services it provides to the individual but on the benefits it provides others).

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[*1101]

E. Objections

The ethic of race-conscious responsibility spurs multiple objections. Rather than rehearse past exceptions, n284 this section briefly considers four rapidly emerging objections. The first condemns the imposition of constraints on a criminal defendant's freedom of choice in formulating a defense strategy. n285 The second assails the same constraints for encumbering a criminal defendant's right to trial. n286 The third bemoans the heightened danger of lawyer bad faith in counseling and negotiation, n287 particularly concerning matters of plea bargaining and accelerated disposition. n288 The fourth criticizes the introduction of additional counseling variables for increasing the risk of incurable error.

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n284. See Alfieri, supra note 32, at 1339-40.

n285. See Stephen J. Schulhofer & David D. Friedman, Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants, 31 Am. Crim. L. Rev. 73 (1993).

n286. See Albert W. Alschuler, Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System, 50 U. Chi. L. Rev. 931 (1983).

n287. Cf. Pamela S. Karlan, Contingent Fees and Criminal Cases, 93 Colum. L. Rev. 595 (1993).

n288. See Stephen J. Schulhofer, Criminal Justice Discretion As Regulatory System, 17 J. Legal Stud. 43, 53-60 (1988).

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Each of these four objections deserves more elaborate treatment than is available in this brief article. Nonetheless, the rough contours of a suitable response may be sketched here. Protests regarding feared impediments on a criminal defendant's freedom of choice in devising a defense strategy, however well intentioned, must concede that client freedom is not ordinarily unfettered. Defensive strategy effectively rests on the discretionary judgments of lawyer counsel. The content of that counsel is subject to greater regulation from statutory code and court sanction than from client ministration.

Moreover, disquiet over the hindering of a criminal defendant's right to trial, while legitimate, seems exaggerated. The proposed ethic does nothing to disturb a criminal defendant's Sixth Amendment right to a jury trial. Rather,

the ethic limits the tactics obtainable at trial. Those tactics already fall under the constraining ethical supervision and evidentiary governance of courts.

Further, worry about the danger of lawyer bad faith in counseling and negotiation, albeit well placed, appears premature. No procurable evidence, empirical or anecdotal, implies bad faith. Neither does the analogy to plea bargaining, and its associated misconduct, offer a basis for such a presumption. [*1102]

Finally, unease concerning the introduction of additional counseling variables, and a corresponding increase in the risk of error, seems groundless. No evidence suggests an escalation of risk. And no presumption of risk finds empirical support. In spite of this insufficiency, the grave consequences of ineffective assistance compel a review of preventive measures, such as enhanced training and supervision in counseling practices.

Beyond this truncated response, the above-mentioned objections warrant consideration of the institutional competence of courts and bar associations in promulgating and enforcing regulations governing the racial conduct of lawyers and clients in criminal defense advocacy. Consideration extends to the enumeration of formal procedural protections designed to safeguard against race-based prejudice in the courtroom and the law office. Implementation of such protections requires new administrative systems and gives rise to the related problems of cost and valuation.

To be sure, the task of assigning a pecuniary value to the deformation of racial identity or monetizing harm to racial community is daunting. Because the nature of the injury is intangible in character, it exceeds the scope of easy economic calculation. Likewise, the task of comparing the actual moral worth or culpability of clients and communities presents alarming difficulties. n289 Nevertheless, roughhewn assessment and open discussion of the potential costs and benefits of racial regulation in the criminal justice system deserves our attention.

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n289. See Jeanne L. Schroeder, Some Realism About Legal Surrealism, 37 Wm. & Mary L. Rev. 455, 462 (1996).

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Conclusion

This article advances a larger, multipronged investigation of racial truth and justice in the criminal defense representation of historical agents of American racial violence. Like prior efforts in this investigation, the article is plagued by an admitted tension between modernist intuition and postmodernist disposition. Lisa Frohmann and Elizabeth Mertz remark that this tension is likely to emerge whenever "analysis moves all events to the level of discourse, stories, and social categories, turning away completely from questions of truth and justice while concentrating on issues of construction, persuasion, and rhetoric." n290 Although the discursive or rhetorical analysis of racialized criminal defense narratives remains critical, [*1103] lawyers should not, indeed cannot, turn away from the pursuit of truth and justice in evaluating

race in America.

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n290. Lisa Frohmann & Elizabeth Mertz, Legal Reform and Social Construction: Violence, Gender, and the Law, 19 L. & Soc. Inquiry 829, 847, 849 n.66 (1994).

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The evaluation of the status of race, racialized defense strategy, and race-neutral representation in the law and ethics of criminal defense lawyering suffers profound ambiguity in part born of the tension between modernism and postmodernism within the CRT movement. Angela Harris observes that the dual commitment of race-crits to the modernist, antiracist goals of traditional civil rights scholarship and to the postmodernist, deconstructive methods of internal critique produces different, perhaps incommensurable, interpretive accounts of the legal subject and the practices of objectivity and neutrality in legal reasoning. n291 Embodied in varied narrative forms, the accounts undermine common faith in Enlightenment reason and popular belief in historical truth. Rather than revive the canons of modernism or reject the critical tools of postmodernism, Harris urges race-crits not only to "inhabit" or "live in the tension" generated by modern-postmodern jurisprudential ambiguity, but also to take hold of its reconstructive potential. n292

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n291. See Angela P. Harris, Foreword: The Jurisprudence of Reconstruction, 82 Cal. L. Rev. 741, 745-60 (1994).

n292. See id. at 760.

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Here, as well as in other remedial contexts of normative prescription, modern-postmodern jurisprudential ambiguity confounds the practical investigation of race, particularly study of the ingrained lawyer habits of race-baiting and the discursive traces of racist ideology in advocacy. CRT scholars studying racial remedies, for example, note conceptual uncertainty in the competing notions of affirmative action and discrimination. Indeed, Girardeau Spann notes that unstable goals and mixed motives may sometimes erase the difference between affirmative action and discrimination. n293

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n293. See Girardeau A. Spann, Affirmative Action and Discrimination, 39 How. L.J. 1, 65 (1995).

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Like justice-based remedial measures, advocacy strategies sometimes require redefinition. The project of redefinition entails a distrust of tradition verging on self-paternalism. The growing cry for the regulation of the self in advocacy signals the move to nonmaterial, psychological claims of spiritual redress n294 on behalf of clients and their communities. Engaging the narratives of individuals and communities of color in critical dialogue demands an

understanding of both black and white racial identity. Ultimately, only an under- [*1104] standing of the politics of identity will break the silence of racial subordination in law and ethics. n295

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n294. See generally Kathy Laster & Pat O'Malley, Sensitive New-age Laws: The Reassertion of Emotionality in Law, 24 Intl. J. Soc. L. 21, 28 (1996).

n295. Anthony Chase urges breaking "the precious rule of silence" in law. Chase, supra note 87, at 47. He remarks: "The day may come when race will no longer be an issue, but that will be after the process of restructuring our collective unconscious is completed - after the seeds of racism, instilled centuries ago, have been eradicated." Id.

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LEVEL 1 - 58 OF 96 ITEMS

Michigan Law Review

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COURT AND CONSTITUTION: POST CONSTITUTIONALISM

Post: Constitutional Domains: Democracy, Community, Management. By Robert C. Post. Cambridge: Harvard University Press. 1995. Pp. ix, 463. $ 45.

Lawrence Lessig*

* B.A., B.S. 1983, University of Pennsylvania; M.A. Phil. 1986, Cambridge University; J.D. 1989, Yale. - Ed. Funding provided by the Russell Baker Scholars Fund, and Sarah Scaife Foundation. Thanks to Richard Craswell for comments on an earlier draft, and to Ashley Charles Parrish for research assistance.

SUMMARY:
... This one First Amendment has just fourteen words touching free speech and freedom of the press, not a code of provisions, each applying differently in separate spheres of social life. ... They define a kind of activity that goes on within each, and they suggest the limits that each may exert over an individual's life. ... This is a domain distinct from the domain of management, for there is no social meaning of inequality inherent in the domain of management. ... The domain of selfreflection has its own logic; we might describe its contours and its limits; and these limits might matter to how we define the domain of community, or democracy. ... This mandate would run against rules directly regulating speech as well as rules indirectly regulating speech, such as the tort of intentional infliction of emotional distress. ... Maybe in the democracy domain, the government can't muck around with speech without undermining the very purpose of democracy. ... What is uncivil speech of the KKK in Selma, say, in 1954, doing? ... Think again about the ambiguity of uncivil speech by the KKK. ... But when someone act to change a social norm, the norms of loyalty punish him. ... That the "logic" of democracy, or free speech, has been violated. ...

TEXT:
[*1422]

Introduction

There's one First Amendment, not a collection of first amendments. This one First Amendment has just fourteen words touching free speech and freedom of the press, not a code of provisions, each applying differently in separate spheres of social life. These fourteen words about speech and the press speak to us

directly - with apparent simplicity, limiting the sovereign's powers in ways plainly established. Yet out of this one amendment, out of these fourteen words, out of this simplicity, constitutional law has generated an enormous complexity. No single principle explains its contours; no simple set of ideas describes its reach. There is none of the tidiness of the constitutional text - none of its directness.

We live in an age when this complexity has a certain cost. The cost is instability. Nothing ties this complicated doctrine to a well understood text; nothing cabins its principles to a manageable core. The complexity is generative, and its generation continues. And with this growth comes a growing impatience that after 200 years it's not clear why there's more to discover. If we were really just working it out, wouldn't we have gotten it by now?

Come then the theorists, with two sorts of replies. The first looks for a principle, or set of principles, with which to explain and justify this complicated array. The idea is to unify the doctrine around a principled core, and the belief is that there will be this one principle, or small set of principles, that can stand outside any particular First Amendment context, yet guide First Amendment inquiry in every First Amendment context. In this way is the approach Rawlsian - not in substance but in form. n1 It is the search for, as Frederick Schauer calls it, the "free speech principle" n2 [*1423] - the project of Alexander Meiklejohn, and Martin Redish, and Geoffrey Stone, and the work of a generation of constitutional law.

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n1. See John Rawls, A Theory of Justice (1971) (presenting this form).

n2. See Frederick Schauer, Free Speech: A Philosophical Enquiry (1982).

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The second reply begins not in the sky, as it were, but on the ground. It asks not what is the free speech principle, then to be applied in every free speech context, but rather, what are the contexts within which the free speech principle applies, and how do these contexts, and the free speech ideals within them, differ. In political philosophy, it is the approach of Michael Walzer n3 - asking (about a theory of justice) not what is the principle of justice that gets applied in each context of justice, but what are the principles of justice inherent in the separate spheres within which justice questions get raised, how do they relate, and how do we draw boundaries between these separate spheres.

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n3. See Michael Walzer, Spheres of Justice (1983) (presenting this substance).

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Robert Post n4 is law's Michael Walzer. His aim is not to find the free speech principle (p. 16). His aim instead is to understand the principles inherent in separate domains of constitutional life, and then to find a way to speak of, and integrate, these local principles. His method is in part realist, and in part post-realist - realist in its openness to the differences of

social context, and its willingness to use nonlegal material to understand the stuff law must regulate; post-realist in its effort nonetheless to find a language within law with which to understand the differences that this openness reveals. n5 There is only one First Amendment, but its meaning, Post might say, depends upon these different domains of constitutional life. The task of constitutional theory should be to understand how to relate these different domains, by understanding the principles inherent in each.

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n4. Robert Post is the Alexander F. & May T. Morrison Professor of Law at the University of California at Berkeley School of Law.

n5. As Post puts it:

American constitutional scholars of my generation inhabit the aftermath of legal realism. No longer for us can the law glow with an innocent and pristine autonomy; no longer can it be seen to subsist in elegant and evolving patterns of doctrinal rules. Instead we naturally and inevitably read legal standards as pragmatic instruments of policy. We seek to use the law as a tool to accomplish social ends, and the essence of our scholarly debate revolves around the question of what those ends ought to be.

P. 1.

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My intuitions are more Walzerian than Rawlsian, more Post than Meiklejohn. I confess that theorizing about complexity just strikes me as better than theorizing into simplicity. My aim in the first part of this essay is to convince you of the same. I will speak as a disciple, for my hope is to persuade that this way of understanding constitutional law better understands, and better justifies, the law that we have than do any of the alternatives. This is an important book by one of America's foremost constitutional scholars; its [*1424] method is distinctive and its conclusions are rich. It should be at the center of our thought about free speech in America.

In the second part I will be more skeptical. For there is a sanguinity to the account here that I do not share. Post writes as if he has told a story that will let constitutional law sleep - an understanding of constitutional law that can make us comfortable with what we are doing, recommitted to the task at hand. But I think the story should disturb. This is not an account that will make constitutional law any easier; it is not an account that shows why constitutional law can function well within our interpretive context. It is instead an account that will reveal just why constitutional law for us remains so difficult. Post wants us to be post-realist in our approach, n6 but what he teaches may make us post-constitutional instead.

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n6. See J.M. Balkin, Some Realism About Pluralism: Legal Realist Approaches to the First Amendment, 1990 Duke L.J. 375.

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"Post-constitutional" means just this: Constitutionalism is that practice of a constitutional culture where limits on the authority of actors with power are enforced in the name of constitutional principle. In the United States, this enforcement is by a court, and here a court's willingness, or eagerness, to act as a constitutional check turns in large part upon the extent to which the court can appear merely to be executing the constitution's command. Clarity, simplicity, and directness in a constitution translate into vigor. Constitutionalism in this sense requires a certain sort of vigor.

Post-constitutionalism has lost this. When constitutional commands don't appear clear, or when they rest transparently upon contested, heated, nonlegal debate, courts are more reluctant. They are reluctant to resolve disputes in these contested domains, because resolution of matters of contest seems within the domain of the democratic branches. The effect of the contest then is to shift questions from constitutional control to political control, from constitutionalism to democracy. n7

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n7. One form of this shift I describe as the "Erie-effect" in Lawrence Lessig, Understanding Changed Readings: Fidelity and Theory, 47 Stan. L. Rev. 395, 426-38 (1995).

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Post rightfully, from the standpoint of truth, criticizes the clumsiness of free speech doctrine. He teaches us something about the sociological facts underlying legal doctrine. He helps us see more clearly the contest of structures that present doctrine lets us ignore. He has, in this powerful book, drawn back the curtain in a land of constitutional Oz.

But what this understanding will do is not clear. For what it does most directly is reveal the contest of values that current doctrine covers with the label "neutral." This is realism brought to First Amendment thought - the last bastion of liberal and formal [*1425] constitutionalism. The question is whether the effect may well be not to liberate First Amendment thought, as much as to kill First Amendment constitutionalism. The question is whether post-realism moves us beyond constitutionalism.

I. The Domains of the First Amendment

We live our lives in many places - in the family, at work, in a public meeting, in the wilderness. These places have a certain logic, not wholly exclusive, but separate nonetheless. This logic defines what is appropriate in each place, sometimes it gives life in that place a purpose, sometimes it simply sets off a range of purposes. Walzer wrote of nine spheres of social life, each a place in the sense that I have used. n8 Post wants to speak more generally, though about a narrower range of social life, by speaking of just three - community, democracy, and management (p. 13).

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n8. See Walzer, supra note 3 (describing the spheres of membership, security and welfare, money and commodities, office, hard work, free time, education, kinship and love, and divine grace).

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These three define three modalities in an individual's life. They define a kind of activity that goes on within each, and they suggest the limits that each may exert over an individual's life. The task of constitutional law, Post argues, is to make sense of constitutional structures against the background of these three separate domains; to develop a constitutional law that can respect the differences in these domains, and sustain them. More particularly, the task of First Amendment law must be to articulate a doctrine of free speech law that is sensitive to the differences between these domains, and that helps ensure that the logic of one doesn't overrun life in another.

But a constitutional theory must do more than describe; it must also guide. An approach respectful of different domains of social life must still provide lessons for resolving disputes at the borders. Domains are never wholly separate. We never live in just one stable place; and even when living in one place stably we are never immune from the influence of other places, and other domains. Domains, or spheres, are separate, but separate spheres bleed. They influence neighboring domains, and distant domains. The question is how, and whether, separate spheres are to be kept separate; how lines between them are to be drawn.

This was Ronald Dworkin's attack on Walzer. n9 Dworkin argued not only that the ideal of a theory of justice based on these multiple spheres of justice was "not attainable," but also that it was "not coherent." The project, Dworkin argued, of looking to social con- [*1426] ventions to "discover appropriate principles of distribution" was simply "not helpful." Social conventions - or in the terms we have used, the logic dividing these separate domains - are inherently contested; if it is the lines between them that are to regulate political debate, then these lines are always up for grabs. Nothing in this multiplicity could provide guidance; worse, nothing in this multiplicity could assure justice. The project was both too radical - since offering no useful guide - and not radical enough - since it simply reflected existing social norms.

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n9. See Ronald Dworkin, To Each His Own, N.Y. Rev. Books, Apr. 14, 1983, at 4 (reviewing Walzer, supra note 3).

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This is the challenge that any Walzerian must meet. The challenge has two parts: The first is whether multiplicity can actually guide justice talk; the second is whether its guidance is anything more than a path home to the status quo. Can this technique constrain decisionmakers to do what is just, and can it liberate social contexts from injustice? These are (in part at least) empirical questions, and law is a structure for evaluating just how they work themselves out. For within law are institutions to adjudicate these claims, and a

practice of adjudication that is essentially Walzerian. Law starts in a Walzerian world. Judges - not the most reflective of our intellectual elite - come to legal questions fully clothed, as it were, with the social understandings of these different social domains. They have not been trained to cut away social context (the picture Justice Thomas gave us of a justice "stripped down like a runner" n10 is as implausible as it is weird); they do not work to abstract guiding and general social truth; they have been trained to resolve problems taking these social understandings, in some sense, for granted. They just see the school as different from a newspaper, the Internet different from cable news. Judges don't start with the free speech principle; they start with an understanding of the social contexts within which it is to apply, and apply it. Or as Post would say, apply or "establish" or define them (pp. 2-3).

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n10. See Linda Greenhouse, In Trying To Clarify What He Is Not, Thomas Opens Question of What He Is, N.Y. Times, Sept. 13, 1991, at A19 (quoting Thomas's testimony).

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The Rawlsian might regret this. He might counsel the lawyer to work quickly to abstract; he might say that the first task is to reflect ourselves out of these particular places, and discover a more general rule. But the Walzerian, or (here we must switch finally to the lead in this play) the Postian, wants to make use of this starting point. He wants us to work from it, to understand a practice of free speech that can respect, and sustain, and track, these separate domains of social life. "Like a chameleon," Post writes, the law must "transform itself to mimic and enhance the social domains it establishes and sustains" (pp. 2-3).

The domains that Post describes, again, are community, democracy, and management. The names don't announce their meaning. [*1427] A little explanation is needed. I will consider them here in the order Post does, though my use of them will not be as balanced as his.

"Community" does not refer to Minot, North Dakota. It is not meant to refer to some time in the past when most lived in small towns with nosy neighbors. In the sense that Post intends, we all live in communities. For community here means that place, or those places, or that "form of social organization" (p. 180) where our identity is in some sense defined, or constituted, by the nature, or the structure, of those with whom we associate - a constitution through this practice of association; an identity produced through "connectedness." The community is that place, or those places, where who I am is in some way constituted by those with whom I associate. Not dictated, or determined (p. 182): the mechanisms of the construction of this identity are too complex for anything so simple, but influenced and directed and evolving "from forms of social interaction" (p. 128). It is the place where who I am is made, in part, by the associations that I make (p. 181). We all live in communities, in this sense, even though we don't all live in Minot.

Modernity therefore doesn't eliminate community; it simply transforms it. n11 Post doesn't say much about how "community" has changed, or better, about how the institutions of community have changed, but many of the differences are obvious. We live today in more communities than before; these communities are

not so much geographically based; they are, for the most part, more voluntary than status-driven; they are, for the most part, more private than public. We associate more than have associations, meaning we choose more what our associations will be, and more of who we are is defined by this association. But whether chosen or not, these associations still define who we are. I may have the choice today to join a Catholic or Jewish congregation; but whichever I choose, if this becomes a large part of my life, much that I don't choose (namely the structure of these communities) thereafter will define me.

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n11. For a sociological account of this transformation, see Clause S. Fischer, To Dwell Among Friends (1982).

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The domain of democracy has a different logic. In this place, I, and others, collectively determine what our governments will be, and to some extent, what our communities will be. Here is the place where collective, and reflective, judgment is to occur, not at the level of an individual's life, but at the level of a collective. Here is where the rules get made, through a process of collective judgment about what the rules ought to be. The domain of democracy is the place where one is critical, where one steps outside of a particular life, or of a particular community, into a life set upon thinking reflectively about how we should live (p. 80). No one lives in [*1428] the domain of democracy; we go there, for a short period of time perhaps, but long enough to look back on the place from where we came. Put too simply, democracy is more than majoritarianism (p. 6); it is the place, free of communal constraints, where we choose how community should constrain us.

And then there is the domain of management. This is the place of instrumentality, where an individual becomes the means to someone else's end - a cog in a machine, a tool for another's purposes, an object to be manipulated. Ghastly it is, the place where alienation is to happen, where the categorical imperative is violated, where our hands are torn from our souls, where we become someone else's, at least for a time. Ghastly, but quite ordinary. For in measured doses, alienation is not all that bad. Kant, or Marx, notwithstanding, we are all means at some time to someone else's ends, and it's not all that bad. We are at times our lover's pillow, yet love is not the worse for it. For limited times, when voluntarily chosen, to an end that we believe in - when these are its conditions, management is acceptable. Management is that place where we submit to instrumental structures of control, and while these structures exercise a control over us that doesn't exist in other domains, the control they exercise is not, for that reason alone, inherently evil. It is indeed just another part of life.

Post's focus on the management domain is more limited than this. For his concern is the management domain where government is the manager. The question he wants to ask is how much the government, as manager, might demand. One might wonder more generally about the domain of management; n12 but Post's focus is quite particular. Indeed, the narrow focus here raises an important question about Post's strategy in general, a point that it is useful to flag from the start.

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n12. So when Post writes "the trend toward management compounds itself, because the growing rationalization of society undermines cultural norms that might otherwise sustain the alternative authority of community," this is just as applicable, one might think, to corporate management as to governmental. P. 5. Yet this public-private distinction is adopted here without any serious question.

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These three domains are not exhaustive. We could imagine others. There is, for example, the domain of dominance - a place where a large number of humans live, subjected to a life of inequality or humiliation. This is a domain distinct from the domain of management, for there is no social meaning of inequality inherent in the domain of management. It is also distinct from community, for again, nothing in the idea of community compels inequality. Or, we might think of the domain of self-reflection, which, like the domain of democracy, is a place where critical reflection goes on, but which, unlike the domain of democracy, is a reflection at the level of the individual rather than the community. The domain of self- [*1429] reflection has its own logic; we might describe its contours and its limits; and these limits might matter to how we define the domain of community, or democracy. But this domain too is not the subject of Post's account.

Thus the domains that Post describes are selected for a particular end. They are not all the possible domains of social life; they are those necessary to a very particular problem - namely, what is the constitutional regime necessary to our self-government? This is not a question asked in the abstract; he is asking it about us, and our constitutional history. But he is exploring it only so far as is necessary to that relatively narrow social question. This is a subset of the question that Walzer might discuss; but it is the set necessary to understanding the constitutional problems put by the First Amendment.

The book marches through these three domains, and its strategy throughout is to use each to suggest how they together play out this dynamic of reflective self-government. n13 But throughout Post is also battling the impatient skepticism voiced by Dworkin against Walzer: Can this multiplicity provide guidance, and can it provide guidance of a useful, meaning critically reflective, kind? n14

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n13. The book actually begins with a chapter on constitutional interpretation, which I do not intend to consider in any detail in the discussion that follows. In it Post outlines three "distinct theories of interpretation": one attempts to implement the constitution through the articulation of explicit doctrinal rules; the second follows original intent; and a "third ... is a form of interpretation that reads the constitution in a manner designed to express the deepest contemporary purposes of the people." P. 29. This may miss a fourth approach, somewhere between the originalist and responsive: this is an approach that seeks to translate original values into the current interpretive context, a strategy in part originalist, and in part responsive, yet neither alone. See Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 218 (1980); see also William

Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782 (1995) (describing and applying the practice of translation).

n14. See Dworkin, supra note 9, at 4.

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The answer is in the telling, and in the balance of this section, I want to tell enough to give a sense of the structure of the account. It is a mistake, I will argue, to believe that contestedness at the borders means this plural account must fail. Post has demonstrated well just how solid this mix can be. But what Post hasn't done is identify a technique that will deal well with this conflict. This, however, is criticism, and this, with others, must await description.

Post begins with the domain of community. Community, as I have described, is that place where the individual, through interaction, constructs, or realizes, or makes, her identity. Law helps construct this place. Not just law, but in part law, and Post's focus at the start is on one way in which law helps construct that place. Courts don't "merely thematize and incorporate ambient cultural [*1430] norms .... Instead courts must themselves display those norms" (p. 18).

His focus is the protection of privacy - first, through the tort of intrusion, and second, through the tort of disclosure. It might seem odd that a cause of action in tort would be a tool for constructing community - in particular, this cause of action. The tort of privacy is a right that an individual has not to be messed with in a particular way. One might think it a paradigm of individualism, rather than communalism. It is how the individual draws fences around his life, or a device with which she may defend these fences. n15 So how then does it have a role in making community?

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n15. Cf. Oscar H. Gandy, Jr., The Panoptic Sort: A Political Economy of Personal Information 190 (1993).

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The key is this: while the tort protects an individual, the fences that it respects are fences collectively drawn. The tort doesn't remedy any subjective injury; it remedies injuries considered by the community to be intrusions. Indeed, it gives this remedy whether the individual considers the intrusion an intrusion at all. Fences here are built by the tort, not by the victim; they reflect the community's judgment about what is properly private, not the individual's. The tort constructs a space of appropriate privacy, and defends the individual against invasions of that space (p. 54). But it defends the individual not so much because the harm to the individual is so critical. Indeed, the tort survives even if there was no harm to the individual (p. 56). The tort puts the affirmation of the state behind the idea that this space is properly private (p. 73), that it is inappropriate, a violation, wrong, shameful, for someone to cross such a line. It is the state saying what is right or wrong in matters of individual dignity. It is the force of the state behind a particular conception of the good.

The law's role here is constitutive of a certain kind of community. It builds this community by defining a certain kind of civility - again, just one part of the norms of civility, and no doubt a small part (p. 65). At the edges, Post wants us to think, the state comes in and defines the extremes. The state does not enforce all such rules of civility. Most get enforced without the intervention of the state. Most, that is, get enforced through a kind of social pressure - a shaming, or stigma - that functions well enough without the power of the state. But at the extremes, the state intervenes. At the extremes, the civility rules of tort step in to enforce the minimum that the community demands.

Civility norms define what kind of community a community is; a community is inherently a normative place, so civility norms are used to define a certain normative order. The state then, to the extent that it enforces these norms, is enforcing a certain kind of [*1431] normative order. It does this by giving individuals a cause of action that punishes those who violate this normative order (p. 58); but what guides the application of this tool is an objective, not subjective, harm (p. 134).

The same account applies to the second privacy tort that Post describes - the tort of disclosure. Here the story is a bit more complex, though the underlying structure is the same. The law protects the individual against the wrongful disclosure of certain facts about that individual. But it selects these facts not by calibrating some subjective measure of harm suffered by the individual. The law protects the individual when the disclosure is of the kind that the law considers wrongful. The law calls this "offensive" disclosure, but offensiveness here is just a reflection of this objective standard. It is the construction, and support, that is, of a public conception of appropriateness; not, like most torts, simply a tool for remedying private wrongs. But unlike the tort of intrusion, the tort of public disclosure has an escape valve. Some disclosures, however harmful to the individual, will be allowed if they are about a "legitimate public concern." Obviously, in defining what is a legitimate public concern, we are defining a contour of community.

This is the kernel of the idea that eventually blossomed into the New York Times doctrine n16 - an idea protecting certain disclosures in the name of a greater public interest in that disclosure. Certain speech must be allowed, regardless of its harm to an individual, because of its benefit to society. Harm is not eliminated; the burden of the harm is just shifted. n17 When matters are within the immunity of the New York Times doctrine, the burden must fall on the victim; when they are outside it, it falls on the perpetrator. It is a law against theft, with a Robin Hood defense if the perpetrator splits the profits with the state.

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n16. See New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

n17. See Frederick Schauer, Uncoupling Free Speech, 92 Colum. L. Rev. 1321 (1992).

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If New York Times were just about competing interests, or economic interests, then these immunities would make no sense - at least as a

constitutional claim. If all that were at issue were competing economic interests, then there would be no more reason to privilege the interest of the public against the interests of the private than there would be to privilege the interests of the private against the claims of the public. In either case, in a post-New Deal constitution, we would, or should, simply leave this conflict of interests to the legislative process.

But there is more here than a conflict of interests. Indeed, just as Post shows that neither tort is really much about protecting private interests - both, that is, are better understood as protecting a public structure of civility - so too is the immunity from these ci- [*1432] vility rules not so much about protecting those causing this particular harm as it is about constructing a certain kind of public space. This is the public space of accountability: a place where individuals must answer for their actions in the eyes of others (p. 19). The conflict between the individual interests and the interests of the community, then, must get resolved, again, through a conception of the community.

There is a technique here that is important, and general. The technique is to see in the common law something other than what a laissez-faire conception of the common law might teach. By both the enemies, and friends, of the common law, we have been trained to see in the common law either the protection of the individual against the state, or the protection of the individual against another. But such divides are too simple. The common law in its protections of the individual also defined a certain kind of community. It was a tool for constructing a certain community (p. 61). Post's method helps us to see this construction, and his method extends quite easily outside the boundaries of tort.

To contract, for example. Indeed Post's point might be made more strongly in the context of contract, for contract seems even more removed from the domain of community; more than tort, contract appears to us a sphere of individual power, removed from the concerns of community. In the rhetoric of the nineteenth-century understanding of the doctrine, here more than anywhere was the place of individual autonomy, and individual power. Contract was the world where individuals made their own law; where, through agreement, they could bind themselves, and subject themselves to the power of the state; but where without agreement, they were free from the coercion of the state.

Consider then the doctrine of reliance. n18 For much of the history of the nineteenth century, there was no enforceable doctrine of reliance in contract law. A promise was enforceable if it was supported by consideration - something given in exchange for the promise, and given because of the promise. Reliance on the promise alone could not make the promise enforceable.

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n18. The following account is drawn from three sources: Jay M. Feinman, The Meaning of Reliance: A Historical Perspective, 1984 Wis. L. Rev. 1373, 1375-88; Robert W. Gordon, Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law, 1985 Wis. L. Rev. 565, 568-69; Michael B. Metzger & Michael J. Phillips, Promissory Estoppel and the Evolution of Contract Law, 18 Am. Bus. L.J. 139, 194-206 (1980). My colleague Richard Craswell warns me here that I am entering a debate about the evolution of contract doctrine that may be beyond the point of this essay. In particular, he suggests that contract law itself

was enforcing contracts with consideration according to existing social norms as much as with the doctrine of reliance, and that for my point, I don't need to make the extra claim that this normative bite comes through reliance doctrine alone. I agree with his point, and mean to point to reliance doctrine here just because it is so rich in the rhetoric of social meaning, not because only it has that rhetoric. See, e.g., Balfour v. Balfour, L.R. 2 K.B. 571 (C.A. 1919), reprinted in Friedrich Kessler et al., Contracts 116-18 (3d ed. 1986).

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At least in a court of law. But law is not the only normative authority within a community. Social norms also exist. These might well regulate the fickle promisor. The fickle promisor might suffer, in this well-integrated community, stigma or shame from leading another on through his word and then not carrying out what his word promised.

This social mechanism might be quite effective, and subtle. Under some circumstances, it might well succeed in making harmful promising relatively infrequent. But at a certain stage, it might also disappear. As individuals within that community become more anonymous, or as the community becomes more heterogeneous, social mechanisms for disciplining inappropriate promising behavior give out. n19 If such behavior is to continue to be regulated, some other mechanism must replace the failing social mechanisms.

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n19. See Steven L. Nock, The Costs of Privacy: Surveillance and Reputation in America (1993) (describing the rise of surveillance techniques).

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Enter the law. For as plainly as any doctrine in contract law, the reliance doctrine is a tool with which courts get to say what promising behavior is inappropriate, or appropriate. By enforcing promises that induced justifiable reliance, the court gets to punish inappropriate promising behavior, while leaving appropriate promising behavior alone. Law then replaces failed social mechanisms, mechanisms that before may have disciplined the same behavior, but that now don't. Law enters with all the good intentions of the state child welfare system, and with perhaps just about as much success. n20

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n20. Cf. Eric A. Posner, The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action, 63 U. Chi. L. Rev. 133, 186-93 (1996) (discussing the effect of legal rules on norms within families).

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It is the sport of first-year contracts to make fun of these efforts at making reliance enforceable. But if one can get beyond the sport, one sees in the opinions just what Post wants us to see in the judgments about privacy: one sees a claim about what is appropriate promising, or contracting, behavior; a claim about how people are to behave. The function that this doctrine plays, no less than the doctrine of privacy, is to define how people like us are to

behave; n21 and to punish those who don't live up to those standards of civility. Perhaps more interestingly than tort, what we can observe in contract law is the law's replacing social norms, just when we might expect social norms to be giving out. The common law acts to buttress norms that before may have been supported by reputa- [*1434] tion or practice, but that now, because of growing anonymity or heterogeneity, cannot be supported except by law.

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n21. The examples from contract law are here many. See, e.g., Lumley v. Wagner, 42 Eng. Rep. 687, 693 (Ch. 1852) (stating why the court should impose liability on the German defendants in the case: "The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other").

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The law enters in contract then, just as with tort, with an expressive function. n22 Far more than the significance of the particular case, it enters to say something about what kind of contracting behavior will be respected, and what kinds not. It acts as a way of defining proper relations among members of a particular community.

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n22. For an application in criminal law, see Dan M. Kahan & Martha C. Nussbaum, Two Conceptions of Emotion in Criminal Law, 96 Colum. L. Rev. 269 (1996).

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This is the point of Post's first move: to get us to see the community in what we would ordinarily think of as the individual - to see the community in tort, or contract, where before we would see the law as simply serving individual interests. The aim in emphasizing this collective is twofold: One part is to remind us of the role that these communities here play; the second is to make more stark a conflict that this role entails. For as romantic or nostalgic as a picture of community might be, it pulls against another part of who we are now. Whatever the place that this community has, we also understand that it doesn't define us fully, or more importantly, that no one community defines us fully. We are each individually constituted by more than one community; and we are collectively constituted by more than one community. No single community speaks for us as individuals, and no single community represents us as a political society.

This raises the problem of limits. For as important as community may be in defining who an individual is, no single community can gain complete control over the definition of an individual. Two kinds of space compete with community: First, space must be preserved for individual autonomy; and second, space must be assured for the competition among communities. It is this second point that focuses Post's second pass at the problem, in a chapter titled "Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment." If there are communities within which we are constituted, then there is more than one community within which we are so constituted. The problem that community

talk presents then is how to understand this multiplicity.

Here Post introduces a second trilogy of ideas, describing three ways of working this conflict of communities (p. 90). Or better, three ways of dealing with diversity within a community. The first is the technique of assimilationism - where one communal form enforces its conception of community upon all else. The second is the technique of pluralism, where the effort is to protect competing cultural forms from domination by any other. The third is the technique of individualism, which cares not at all about particular cul- [*1435] tural forms, but only about protecting the individual against the coercive enforcement of any particular cultural form upon him.

Post illustrates these three attitudes in an extraordinarily rich discussion of, of all things, blasphemy law. He begins with blasphemy law in England, which itself began firmly rooted in an assimilationist tradition. Anyone questioning the truth of Christianity was subject to the savage punishments of this regime (p. 95). Questioning the revealed truth of Christianity was a proxy for a more general moral turpitude, which, the state of England viewed, opened one up to proper punishment.

This is a quaint story about old England. What makes it fascinating is that the law of blasphemy continues in England to the present day. In 1977, for example, a gay journal was prosecuted for blasphemy, for questioning the Church's teachings with respect to homosexuality. n23 The House of Lords upheld the conviction, but the central opinion, Post argues, was not assimilationist (p. 98). As Lord Scarman describes, what constitutes the wrong is not the questioning of the doctrine of Christianity; the wrong is questioning the doctrine in the wrong way (p. 100). What makes some speech blasphemy is that it questions another's religion in an insulting or extreme manner, not that it simply questions another's religion. So understood, blasphemy law would protect not just the dominant culture's religion, but also every other religion. Here the founding value is no longer the dominant culture's, but rather a founding value of toleration. Here the competition among communities is resolved by the state preserving a certain peace among the combatants, by punishing those who insult another's community (p. 98).

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n23. See Regina v. Lemon, 1979 App. Cas. 617, 660 (Lord Scarman).

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America is not this culture of toleration, however. America, that is, does not solve this problem of competing communities by protecting each community against the insult of another. Instead, America is the culture of individualism. Rather than the neutrality of peace among the combatants, the American strategy is to preserve the right of any individual to criticize anyone at all. The state stands neutral here not by protecting the group against harm, but by protecting the individual against state-imposed punishment. n24

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n24. There is something a bit odd about this notion of neutrality when it is compared with an equivalent notion about property. Imagine that the state said it was being neutral with respect to distributions of property by refusing to

coerce those who steal from others.

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The American approach is represented in the case of Cantwell v. Connecticut. n25 Post begins by reminding us that though the First Amendment has been around since 1791, and though identically worded state constitutional provisions have been on the books since an earlier date, blasphemy has been a crime throughout America [*1436] up until just twenty years ago (p. 102). Not until Cantwell do we get a very clear picture of just why blasphemy laws can no longer be enforced in the American context: Toleration, Cantwell says, cannot constitutionally be enforced. An individual must have the right to question and attack a form of community, even a religious community, in whatever form he sees fit. For the right of the speaker is the right protected by the First Amendment (p. 104); and that right cannot yield to any conception of group interest protected by a principle of toleration. In America, free speech means the right of the individual to be free to attack groups, to use that attack to help reconstruct new groups (p. 105).

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n25. 310 U.S. 296 (1940).

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The state will not be used to punish, through the force of law, any who might attack another group; that group must sustain itself through voluntary action, if it sustains itself at all (p. 138). The picture here is that a community gets made, if at all, through the voluntary action of individuals.

This assumption about how community gets made - this picture of individuals reconstituting community - is a claim I return to in the section that follows. The assumption provides a transition between the first and second sections of the book - the transition from community to democracy. The first section is about how community is normative in the life of the individual, the second section, about democracy, is about how the individual must be protected from the community's normativity if he is to function properly within the democratic sphere. Democracy is the place where critical collective reflection goes on, and the question for constitutionalism is how much immunity the Constitution must grant to assure that this reflection can properly occur.

Now again, the sense of "democracy" here is a bit counter-intuitive. Democracy does not refer to the processes or substance of collective deliberation. It refers to what we might call the necessary immunities that individuals must have to participate in this practice of democracy. From what do individuals have to remain free in order to be properly free citizens within a democratic system? How free must individuals be from norms of civility so as to maintain space for public deliberation?

Post introduces the question with a classic First Amendment conflict, Hustler v. Falwell. n26 Hustler had satirized Jerry Falwell, and his mother, in a nationally published pornographic magazine. The satire was by cartoon. No one could view the cartoon as "civil"; it was repulsive even from the perspective of those who least admire Falwell. But it was incivility directed against a public figure, and hence within the ambit of the New York Times doctrine.

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n26. 485 U.S. 46 (1988).

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Falwell tried to avoid the application of New York Times, by arguing that this cartoon was an intentional infliction of emotional distress. His gambit was thus to avoid the free speech doctrines all together, and embrace instead what Post calls the civility norms of the common law (p. 127). Any community requires civility norms; this publication ignored all of them.

The Supreme Court, in an opinion by the newly-Chief Justice Rehnquist, reversed the Virginia court's finding of liability against Hustler. The mandate of the First Amendment, the Court held, was to facilitate the free flow of ideas and opinion on matters of public interest and concern. n27 This mandate would run against rules directly regulating speech as well as rules indirectly regulating speech, such as the tort of intentional infliction of emotional distress. This protection, the Court held, did not depend upon the motivation of the speaker; it existed not just because it was opinion, but also because it was the attack of a public figure. n28 Moreover, the protection was absolute because any other protection, relying upon a judgment of "outrageousness," would depend upon factors that are "inherently subjective." n29 The "inherently subjective" is not the business of the state.

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n27. See 485 U.S. at 50.

n28. See 485 U.S. at 51.

n29. See 485 U.S. at 55.

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There was a certain drama to the Hustler opinion, on the surface a ringing ACLU-ish endorsement of the First Amendment by a new conservative Chief Justice. But it didn't take much to see that the opinion couldn't really be taken seriously as a statement of constitutional principle. For the principle had no limit. In its absolutism, it wipes away precisely what Post defends as the state's place in constructing community. If the attempt to define norms of "outrageousness" was too subjective, what justified this effort of communities more generally?

Hustler is the rejection of defamation law's foundations. Defamation in the common law tradition had a twin origin. It began both as a criminal action, and also as a civil action (p. 129). Truth was a defense only in the civil action, which meant that the criminal action was concerned only with assuring that speech didn't invade dignity interests, whether true or not (p. 130). Some things could not be said in the common law regime, because saying them was not considered civil.

The function of this criminal regime then was public, not private. It was about maintaining a certain kind of public discourse; about maintaining a certain civility within this public discourse. The civil regime was different. It was designed more to compensate for wrongful accusations. Truth, therefore, was relevant to this de- [*1438] termination. So that the defamed who was defamed with the truth could gain no private gain from this defamation. The only action for such a victim was the public action.

Post recounts the slow evolution of the common law to merge these two actions. The first Restatement, for example, replicated the distinction between civil and criminal by creating one tort, focused on civility, and another, focused on false statements. n30 In 1974, "ridicule" was added to the Restatement, further refining the civility notion. n31 Speech that was essentially ridicule, that was essentially uncivil, would not, under this regime, gain constitutional protection.

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n30. See George C. Christie, Defamatory Opinions and the Restatement (Second) of Torts, 75 Mich. L. Rev. 1621, 1625-28 (1977).

n31. See Restatement (Second) of Torts 567A (Tent. Draft No. 20, 1974).

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This evolution was terminated, however, the very same year. In 1974, in Gertz v. Robert Welch, Inc., n32 the Supreme Court definitively shifted the tort to a concern for truth alone. The only speech that could, constitutionally, be proscribed was false speech; ridicule when based upon opinion was constitutionally protected (p. 131). This clear extermination of civility notions within defamation forced the displacement of the values protected by that tort to other torts - in particular, the privacy tort, and intentional infliction of emotional distress. In both torts, now "outrageousness" replaced ridicule; the question was whether the behavior, though speech behavior, was so outrageous as to violate norms of civility thought fundamental (p. 129).

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n32. 418 U.S. 323 (1974).

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Hustler brings Gertz to this displaced civility tort of intentional infliction of emotional distress. Now here as well, even with speech behavior deemed outrageous, no proscription through law can be permitted constitutionally. We must stand by and let the market control this vileness. Why? The Court's account is almost Borkish: it is that any effort to proscribe the "outrageous" would be too unprincipled, too "subjective," for law. n33 But if Post is to follow Hustler, he can't follow it for reasons like these. Post can't reject these reasons because they are "subjective." Indeed, the great strength of Post's work is to show the space between the subjective and the objective within constitutional thought. What defines community standards is neither the objective nor subjective; what defines community standards is a particular judgment of a community - local, so not objective; collective, so not subjective (p. 134).

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n33. See Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 8 (1971).

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Post then needs a different account to make sense of the constitutional protection granted to "public discourse." Public discourse, as Post defines it, is a discourse that "encompasses the communi- [*1439] cative processes necessary for the formation of public opinion" (p.302). Stated most abstractly, his argument is this. Speech deemed within the realm of "public discourse" may be subject to neither norms of the community domain nor norms of the managerial domain. Instead, such speech must be free of collective norms generally. For this speech, the individual must be granted a constitutional immunity; she must be left free from state coercion.

Post is describing the necessary space for critical thought. Life is about - the metaphors here are endless - moving between living and thinking critically about how we should live; it is about acting on the stage, and then stepping off the stage to think about how life on the stage should proceed. When one is in this critical mode, it makes no sense that the norms of the life one is thinking critically about should limit the ability to think critically. Here, in this space for critical thought, and action, one must be free of these norms. It follows that the norms of community that otherwise define one's life must be, in a sense, shut off when one is thinking about how one should live one's life.

This picture of reflection is everywhere in critical thought. It has a naive version, and a not-so-naive version. The naive version is expressed by a regret in a novel by Milan Kundera. n34 Says Kundera:

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n34. Milan Kundera, The Unbearable Lightness of Being 8 (Michael Henry Heim trans., 1984).

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We can never know what to want, because, living only one life, we can neither compare it with our previous lives nor perfect it in our lives to come.... There is no means of testing which decision is better, because there is no basis for comparison. We live everything as it comes, without warning, like an actor going on cold. n35

But who would do the picking among these various lives? Which is the person who gets to live all the other lives, and then choose the life that is best? For choice is made within a life, and if the person selecting the life is without all lives, then he has nothing with which to make this choice. Likewise with the space within which one stands when one is critical about life within community: One does not stand outside any community; one is not free of all normative judgments; one is not defined as the person who has no life. That person could not reflect on life within a community, because, like the character in

Kundera's novel, that person would have no life with which to make this reflection.

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n35. Id.

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The not-so-naive version is thus more limited. Public discourse, under this version, is a place where the individual can say what he or she wants, without fear of government censorship, or direct punishment for views expressed. The immunity that democracy must [*1440] provide is against one kind of punishment only. It is not an immunity from every sort of punishment, or every form of life. The community may properly hate your ideas; they just may not lock you up for them.

Public discourse is thus an importantly limited critical practice. It is limited first because the thing it is directed most firmly against - state censorship - may in this world be quite a tiny danger. Second, the thing it ignores when granting this immunity - social sanction - is really quite great. Compare two techniques for regulating pornography: one that bans the sale and distribution of pornography, the other that publishes the names of consumers of pornography. n36 It is not plain that the first is a more effective technique for regulating pornography than the second. Yet only one is on the First Amendment's screen.

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n36. Cf. Dan M. Kahan, What Do Alternative Sanctions Mean?, 63 U. Chi. L. Rev. (forthcoming 1996).

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In the second part of this essay, I want to return to this point about the limits of this principle against censorship. My point here is just to emphasize the smallness of the space that this public discourse model wants to open up. The idea is that we must immunize individuals in their effort to attack existing structures, so that communities are formed from the voluntary associations that these attacks may produce. There is, Post says, a marketplace of community. Within this marketplace, individuals compete to form, and reform, social groups. Law, within this marketplace, must remain neutral among the many groups that may get made. Neutral then means not interfering with private power. n37

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n37. Again, compare this point with the same point made, supra note 24, about the state's power vis-a-vis property.

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Post is describing a balance, not a foundation. He is giving a reason why one kind of punishment may not be applied to speech, but he is not giving an argument why all norms of civility should be displaced. Indeed, the richness of his account here is just its appreciation of the tension between this

principle of public discourse and the construction of community. This is a tension that cannot be avoided, and that defines, as he describes it, the paradox of public discourse: public discourse must "blunt" rules of civility if it is to assure a critical space within which reflection about community life can occur (p. 301). Yet if it blunts these rules of civility too much, it will undercut the very community that it criticizes. Once again we have a tension that cannot and should not be resolved. It is a tension that must be sustained, between open space for speech, and a closed space for building the conditions of a community.

The domain of democracy is about a limit on the scope of community, it is about when norms of community must be suspended so [*1441] that a critical space may be preserved. This is the very same question raised in the third section of Post's book, describing the management domain (pp. 197-289). But here the norms are instrumental, not constitutive. Just as there is a domain, the domain of community, where norms of a community operate to coerce an individual into being a certain sort, so too is there a domain, the domain of management, where instrumental norms coerce an individual into doing things of a certain sort. These are both places where the individual is, for these different reasons, not free; and they are both domains that, because of both kinds of unfreedom, must, in principled ways, be limited. Stalinist Russia was a place where people lived exclusively within the domain of management. An Amish village is a place where people live exclusively within the domain of community. We live in a place where people move among all three, and the question for constitutional law is how to draw the boundaries to preserve all three.

Post describes two contexts within which the limits of the domain of management get raised - the first, the public forum doctrine; the second, the scope of "collectivist" free speech doctrine (pp. 199, 268). I will discuss only the first at any length.

The question for public forum doctrine is just this. There are places that the government owns. It regulates access to them, it determines the activities that occur within them. The public forum doctrine asks whether there are limits on this power of governmental control.

The pattern of the solution should now be familiar. Post asks us first to discriminate - to distinguish the ends to which governmental regulation in a public forum is a means. If the ends are managerial, if they are directed at legitimately managing objects properly within the government's domain, then the First Amendment limits on the government's techniques should be small. If the ends are not managerial, if the speech is speech about governance, then the First Amendment limitations on the government's power should be great (pp. 237, 245).

Post's analysis parallels the "Court's decisions dealing with the internal management of speech" (p. 244). The question is: What are the limits on the government's ability to manage the expression of the people it employs? In both contexts, the question is about how the government's power should be limited, given the competing interests of the public space. In both contexts, the analysis is just the mirror image of the one used to answer the same questions asked about the scope of community norms.

The answer in both cases looks to the proper managerial role being served by the government institution, and to whether the regulation at issue reasonably

serves this regulative role (p. 245). This [*1442] is different from the Grayned n38 approach, which asks simply what is the government's interest in regulating the speech at issue, and whether that interest gets outweighed by the speakers' interest. It is different because it is not thinking about these interests in the abstract; it is placing them within particular institutional structures. Within those institutional structures, the question is what sort of end the speech restriction serves. If it is a properly managerial end, then the institution gets a form of deference in its judgment about the scope of the speech restriction, if indeed granting deference is an appropriate, or necessary, feature of this institution.

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n38. Grayned v. City of Rockford, 408 U.S. 104 (1972).

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The approach here just patterns the approach in the second section of the book. For just as there the question was how much space must the individual have vis-a-vis the community, here the question is how much space must the individual have vis-a-vis the government-as-manager. What is driving both is a competing vision of a properly regulated domain - whether community or management - and the proper space to be left open from that domain - where the individual cannot be made subject to the commands of the regulated domain. Again, what is sustaining the conflict is the notion that neither domain can be eliminated: both must sustain themselves, this tension notwithstanding. The necessity of this tension, the way in which it sustains the lives it opposes, the richness it allows - this is the lesson Post wants to teach.

* * *

There's a place in cyberspace called LamdaMOO - a MOO, or a MUD, one of thousands of MUDs in cyberspace, places where people play out roles, or games, where they define their own characters, and environments that, because played in a virtual world, stick. n39 A person enters LamdaMOO however he wishes, as a man, or a woman, or a fish; with an attitude, or a question, or a longing; with a purpose, or just wandering; for a short time, or for years. What happens in this virtual space is what happens in real space, but this virtual space is much more plastic than the real world - for again, who one is is subject to definition; and the world one plays in is subject to manipulation. One can design oneself to be a cat, and then design this cat such that if a bird flies into the room, the cat will meow. This cat that meows, then, interacts with others in this space - which means talks with others, or walks with others, or flirts.

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n39. MUD stands for a "Multiuser Dungeon;" a MOO is a "MUD, Object Oriented." See Lawrence Lessig, The Path of Cyberlaw, 104 Yale L.J. 1743, 1747 n.11 (1995). LamdaMOO is well-described in Julian Dibbell, A Rape in Cyberspace, Village Voice, Dec. 21, 1993, at 36.

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- [*1443]

It is slowly becoming impossible to ignore these places of cyberspace. What they are doing to individuals who live in them is extraordinary, yet largely unknown. n40 They are engines of multiplicity, and maybe duplicity; machines that facilitate the living of many lives. And unlike the many lives that most in modern society live all the time - awaking a lover, making breakfast as a mother, racing to work as a lawyer, etc. - this multiplicity occurs simultaneously. On one screen one can have many windows, and in each window, one can play a different character. As one male player describes it:

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n40. For an exceptional first introduction, see Sherry Turkle, Life on the Screen (1995).

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I split my mind. I'm getting better at it. I can see myself as being two or three or more. And I just turn on one part of my mind and then another when I go from window to window. I'm in some kind of argument in one window, and trying to come on to a girl in a MUD in another, and another window might be running a spreadsheet program .... [Real Life] is just one more window and it's not usually my best one. n41

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n41. Id. at 13.

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Whatever else this amazingly bizarre world does, it does help us see something that is central to the argument that Post presents. First, it helps us see life within this community. For however odd, or frightening, one imagines that the life of these MUDers is, it is plain that what they do in this elaborate game is construct an identity and a society through extensive interaction over time. They build, that is, a community. They may choose who they are as they enter the MUD, but over time who they are gains a kind of social capital. They gain this capital through extensive conversation with others in this space. Indeed for many, this is the closest contact they have with others in a community. The games have logic; the players play subject to that logic; they play over times, and through time, that logic, and who they have been, sink in. One becomes that person, however one becomes a person, that one plays in cyberspace; his identity is in some way linked to the character.

But this community also helps us see two other critical parts to Post's account, one implied, one express. The implied is the place for the individual, independent of these roles, and here the technology magnifies the sense in which we imagine, or hope, that an individual is something other than what these communities define. There is a person separate from the character(s) he or she plays. Not wholly separate - we might worry about what the games do to the

person in real life, and we might hope that the person in real life (RL) has some effect on the people in the games - but separate enough. [*1444]

The express part in Post's account is the place for democracy, and here is where LamdaMOO becames so instructive. For as well as there being individuals outside the games, there is a collective outside of the games. The collective is all those who play the games, and they became a collective in the sense Post means when they deliberate collectively about how life in the MOO shall proceed.

In LamdaMOO, such a collective exists. After a particularly evil sort did a grossly awful thing to a number of people in a living room one night, n42 the Wizards of LamdaMOO built democracy into the world of LamdaMOO. This was a space - call it a domain - where people discuss propositions for regulating this community. These propositions are voted upon, through an extensive balloting process, and these ballots then determine life in the community.

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n42. Described in Dibbell, supra note 39.

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The link to Post here is this: that when one is in this place where democracy is the rule, one is outside the particular communities that one has up to then been living. One can step outside one's character to debate what rules should collectively govern these communities; no game can tie one up so that one is silent in this public space.

The game-playing stops, then, in two very different ways. One is when a person leaves the space to return to RL; the other is when one leaves the game, to discuss what rules should govern the space generally. When one leaves for RL, one returns an individual; when one leaves for the discussion, one begins a process of collective deliberation. n43

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n43. Cf. p. 7 ("The essential problematic of democracy thus lies in the reconciliation of individual and collective autonomy.").

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Though few have lived it, I suggest that our intuitions are well-trained in a case like this. I think we all see the need to preserve this balance of spaces - the need to preserve either the retreat to an individual space, or the advance to a collective space where rules of the MUD get made. The question is how much of these two kinds of escapes there must be to assure that this middle place doesn't get out of control.

This is the balance that Post is pointing us to, I suggest, in two different ways. In the one way, it is about the relationship among the individual, community, and democracy. In the second, it is about the relationship among the individual, management, and democracy. These are precisely parallel problems, both about how much this middle domain - community and management - should be allowed to control an individual, and the collective made up of these individuals. The community is one space where individuals live; it is a space

where the individual must be free to some [*1445] extent to determine whether this community is where she wants to live; and the community must be free, to some extent, of the constraints of the community to determine whether this community is how the community wants it to be. Thus the pull of the individual space and democracy at both ends of community.

The same pull exists in the domain of management, for management, like community, is a structure for controlling individual and communal life. It must be left open for the individual to question his participation in this structure, and left open for the community to question the structure itself. Its tensions, though in substance different, are in form the same as community tensions, and the tensions of LamdaMOO. The practice for resolving them is the general practice that Post has displayed. And described. And recommends.

II. Questions

My aim in the first part was to describe. My purpose here is to question. I focus on four questions, moving from the less significant to the more. These are not limits of one author; they are limits of a constitutional culture. For again, my view is that the practice Post has described is the best that constitutional law can be; but it may well be that constitutional law cannot be very much. At least for us, at least just now.

A. How To Defend Borders

Running throughout this book is the idea of multiplicity over unity. That we should see the differences in the contexts within which First Amendment norms must apply, rather than speaking as if all were the same. That we should understand the different forms of life necessary to sustain democratic self-government, and build a regime that can support these differences. There may be just one First Amendment, but we need a rich understanding of that amendment to help us navigate these different domains of social life.

The hard question is drawing the boundaries - finding a way convincingly to place one sort of activity within one domain, and to distinguish it from activities in another. Post's aim is to focus on this "largely unappreciated struggle[] ... about how the boundaries between distinct realms are to be fixed" (p. 2). But the focus is on techniques for a court. It is a court that will make the distinctions that this richer theory demands. A question then might be whether the tools that Post provides give courts the capacity to so distinguish.

In Post's view, this challenge is a difficult one. The problem with courts is that they are too thick-thumbed about the matter. The pattern is familiar: academics give the Court a fairly rich [*1446] model for understanding, and applying, First Amendment doctrine; the Court selects a fairly clumsy and crude model instead.

Public forum doctrine is a good example. Public forum doctrine gets born in an ambiguity. Both in its founding opinion, Hague, n44 and in its announcing

law review article by Harry Kalven, n45 it is never quite clear whether what makes something a public forum - and hence a place where the government's ability to manage speech is constrained - is something about the property itself, or something about the nature of the government's interest in regulating speech within that property. The theoretically unrespectable position is the position that makes this turn on something about the property itself - whether, for example, it has always been dedicated to the public, or whether it is a street, or park, or any other such contingent and theoretically irrelevant fact. The theoretically respectable position is the latter position - that the status turns on something in the nature of the government's interest in regulating speech. In line with this respectable position, at least one Supreme Court case articulated a fairly respectable test: As the Court said in Grayned, the question has nothing to do with the kind of governmental property at issue (p. 209); it is simply that if government property is at issue, then the government must show that its interest in regulating the speech outweighs the burden the regulation imposes on the speech. An exercise of power to silence then must always be based on a justification referring to the nature of the government interest.

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n44. Hague v. CIO, 307 U.S. 496 (1939).

n45. Harry Kalven, Jr., The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1.

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Post likes neither approach. He doesn't like the "kinds of property" approach because it is a conclusion in search of a theory. He doesn't like the Grayned approach because it is not sufficiently respectful of the proper management role that government might have within a properly managerial domain. As I described before, in Post's view, the question is whether the speech restriction is necessary to a legitimate governmental purpose; and if it is, then courts should defer to that decision, to ensure that authority is maintained where authority is necessary.

With this I agree. The problem is in the next step. For from the fact that Post has identified what is plausibly a better account of and justification for existing public forum doctrine cases, he wants to infer that public forum doctrine should now be reconceived explicitly along these lines. Once we know the contours of the constitutional doctrine, he says, we should adopt a constitutional approach that makes those contours clear. Rather than this collection of crude approximations at a constitutional theory, we should embrace [*1447] an approach that explicitly recognizes the constitutional values at stake, and determines them (p. 17).

It is this step that I think we must pause upon. For it has within it an assumption that is common within constitutional theory and, I suggest, commonly wrong. This is the assumption that transparency is costless; that direction always trumps indirection; that the best way to deal with conflict and ambiguity is openness, and honesty; that struggles are best on the surface.

These may be good maxims for life, or maybe for love. I want to suggest that we think more carefully about whether they make much sense when applied to the

work of the Court. Post's theory shows us that the lines the Court must draw are lines right in the midst of a great struggle. n46 They define the area of contestability. n47 They represent just where our intuitions about the separate domains give out. It is here the Court must do its work. But granting all that, does it follow that the Court must do its work openly?

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n46. Cf. p. 14 ("The location of that boundary will no doubt be unstable and contestable.").

n47. This is not to say that all norms are contestable, or even that they are "typically contestable." See p. 183. I think it is a mistake to equate contestability with normativity. This is at the core of Renford Bambrough, Moral Scepticism and Moral Knowledge (1979). It does not follow from the fact that a social meaning is a "political issue" that "like ... all political issues" it must be regarded as "indeterminate." P. 307. Social meanings, like social norms, can be contestable or not, determinate or not, and in the main are far more uncontested and determinate than we think.

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This may sound like an odd question, but its answer is infected with a related oddness. Why, we might ask, is the Court so clumsy? Why, given a choice between two understandings of the public forum doctrine, does it pick the dumber of the two? There is an answer to this question, I suggest, and it resonates beyond simple intelligence, or politics. The answer is tied to something we cannot ignore about the institutional position of the Court. Think about the rhetorical position of the Court executing each of the public forum doctrine tests. In one test, the Court must articulate the relative strength of two highly contested values, and it then must decide which value is more important than the other. In the other test, the Court must report on whether a particular place is a "traditional public forum." Which test is the easier of the two to apply? Not easier in the sense of which is intellectually less difficult, but easier in the sense of rhetorically less burdensome.

The answer to that depends upon the rhetorical costs for each question, and what these are depends upon the institution in question. If it were a legislature confronting the question, there would be relatively little cost in openly saying that it was resolving a conflict of values through its own majority vote. The same is not true of a court. While it is to be expected that a legislature will confront [*1448] conflicting values, and expected that over time its resolution of that conflict will change, it delegitimates the position of a court for it to be seen openly to confront a conflict of values; it undermines its institutional position for it to embrace a test for resolving such conflicts that can't help over time appearing to be merely the result of politics. The social meaning of a legislature is politics; the social meaning of a court is not.

What distinguishes the two public forum tests is just this difference in how each will make the Court appear. One test is truer to First Amendment values, yet the Court's application of that test would constitute a form of rhetorical self-immolation. The other test is logically unrelated to the First Amendment values, yet it can be applied in a way that preserves the Court's appearance of neutrality.

This difference, I suggest, matters. It matters because in the selection of a test to enforce systematically constitutional values, the Court can't help but consider its own institutional burden in applying this test. When the institutional burden is great, the Court will select away from that test. When the institutional burden is slight, the Court might select that test, even though its articulation, or elaboration, of the constitutional value underlying the test is inferior to the elaboration of another test. Fidelity to constitutional principle is just one value in the Court's collection of values, and we have seen enough to know that at times it is sacrificed in the name of an institutional interest.

What makes a test costly? It is not that the test involves "values" rather than facts. What matters is whether the value or facts involved in the test are, in the present circumstance, contested, especially in ways that appear to reach outside the legal domain. It is the contestedness of the terms of a test that render it costly for a court to apply. For it is contestedness that makes it difficult for the Court to apply the test in way that will seem consistent (p. 15). Inconsistency is the simplest signal that perhaps something other than law is going on, and what the Court needs to do is to select tests that rarely produce that signal.

We need to account for this dimension of constitutional practice more fully than we do. It is a focus that has a long pedigree in constitutional theory. Felix Frankfurter was an important exponent of the concern; n48 Robert Bork in our own day continues that obsession. n49 But the reason for our focus on this dimension need not be that we believe the questions that are contested have no answers. Contestedness is relevant, in other words, not because the domain of the contested is subjective, or incapable of rational judgment. [*1449] That was Bork's view, but it is not mine. Contestedness is unrelated to the ontological status of the matter contested. We all, I am sure, have views about abortion that we each believe true. Nonetheless, we all understand that views about abortion are contested. The contestability might (read: should) make us a bit more humble about the forcefulness with which we assert our views. But it doesn't on its own undermine the judgment we might have that certain views are true, or not.

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n48. See, e.g., Felix Frankfurter, The Commerce Clause 22, 58 (1937).

n49. See Robert H. Bork, The Antitrust Paradox 26 (1978).

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Contestedness is relevant to a court not because it identifies the subjective, but because it marks out that space where, in the present interpretive context, there is no clear link between (a) an authoritative legal text and (b) one or another view of a contested matter. Reasonable people may differ, and in such a context, what the Court wants first is a way to resolve the question without disagreeing with reasonable people. It wants, that is, a test that draws away the political cost of one decision over the other.

What this should suggest, I want to argue, is an institutional reason why we can observe these dunderheaded doctrines of constitutional law - doctrines that have no apparent connection with underlying constitutional values, but that

nonetheless seem to persist. The reason is this account of institutional cost. The Court, or Justices on the Court, feel this cost just as they feel the cost of sexist speech in their opinions, and change their opinions accordingly. Contestedness has a kind of stigma associated with it, and these well-socialized Justices avoid this stigma as they avoid stigmas of every other kind.

Which brings us back to Post. For what all this should suggest is a certain incompleteness in the plan that Post presents. It is no doubt important, at the level of theory, to identify completely the contours of constitutional doctrine. It is an advance to show, for example, that there are three sides, not one. It is important, in articulating this theory, to show just how the theory fits with existing practice. But that is just the first step of constitutional theory. For theory must be translated into practice, and one unavoidable dimension of practice is this constraint on the tools the Court can deploy. What an elegant theory of constitutional law needs is a dunderheaded way to apply it. What it needs are tools of practice that can be used to advance the constitutional values at issue without undermining the institutional position of the Court.

It is not an answer to the dunderheads simply to say that the Court should "struggle openly" about these values. Struggling openly about constitutional values has a social meaning in this institutional context that, for a court, may be self-defeating. We might question the social meaning, we might want it to be otherwise. But a question and wish does not remake a social practice. It will take [*1450] much more than rich theory to move our constitutional culture off this debilitating skepticism.

B. What's Speech Got To Do with It?

It is easy for us, as lawyers, to think that law is terribly important. n50 It is easier, as well-socialized sorts, to think that the sanction of law is the only real sanction within our society. People don't get condemned by the church much any more; dueling has apparently died. So we are left, it may seem, with a world where the only limits on our freedom are the limits set by the market and by the law. We may think that beyond that, we are essentially free.

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n50. This thought no doubt inspired Robert Ellickson's Order Without Law: How Neighbors Settle Disputes (1991)

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Part of Post's purpose in the first part of his book is to dislodge just this view. At the core of his account is the community. But community is, as Post describes, not where we live; it is instead a form of life in part constituted by a structure of sanctions. If we don't see community's sanctions because we have become so well-socialized, then this is a function of blindness, and not nonexistence. Our steps are guided as much by these social sanctions as by legal sanctions; no doubt more. Quoting Sabina Lovibond, Post writes: "The norms implicit in a community's ... social practices are "upheld,' in quite a material sense, by the sanctions which the community can bring to bear upon deviant individuals." n51 One question Post's account might raise is just what

place this nonlegal structure of sanctions should have in the law's account of the First Amendment.

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n51. P. 147 (quoting Sabina Lovibond, Realism and Imagination in Ethics 61 (1983) (internal quotation marks omitted)).

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To answer this question, we should think a bit more generally about community - about what it does, or what it provides, to the individuals within it. Among the many things that a community might provide are a class of things we might call collective goods. Collective goods are goods that can benefit everyone in the community if anyone at all; and they are goods that no individual alone would have a sufficient incentive to provide. n52 I am not saying that communities provide just collective goods; they also provide individual goods. But the class of goods that provides the greatest trouble is the class of collective goods, and these are the focus below.

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n52. See Posner, supra note 20, at 137-42 (discussing collective goods).

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To provide these collective goods, communities use sanctions. Some sanctions are legal - the collective good of security from violence is supported by criminal sanctions against violence. But most sanctions are nonlegal; they get their force from mechanisms [*1451] outside the law. Attribution of bad reputation, or shaming, or exclusion - these are all the techniques of social sanction, all deployed within a community to control, as much as possible, behavior within this community. n53

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n53. This is the focus of the Chicago School. See Kahan, supra note 36; Cass Sunstein, Social Norms and Social Roles, 96 Colum. L. Rev. (forthcoming 1996).

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The fact that such social sanctions are not "legal sanctions" should not suggest that they are any less significant or forceful. There is as much violence in ostracism as in a civil fine. Indeed, for many the fear of social sanction is far more effective than the fear of legal sanction. It is easier for me to imagine committing a felony - well, some felonies - than it is for me to imagine crossing some of the silliest social lines. n54 Social sanctions and legal sanctions are not ordered in some hierarchy of significance or force; there are extremes on both sides of this line. Both work to constrain individuals to contribute to the supply of collective goods.

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n54. See p. 75 (" "The dread of public censure and disgrace is not only the most effectual, and therefore the most important, but in numberless instances

the only security which society possesses for the preservation of decency and the performance of the private duties of life.' ") (quoting Thomas Starkie, A Treatise on the Law of Slander, Libel, Scandalum Magnatum, and False Rumors xx-xxi (1826)).

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These social mechanisms function in part through what we might call the device of social meaning. By "social meaning" I mean a name and a price given to an action, inaction, or status that (a) in a particular community has a well-defined association (whether positive, or negative, or neutral) and that (b) is internalized by a significant portion of the community with which the meaning is a social meaning, such that people feel the appropriate association when the social meaning is uttered. n55 So, for example: "not telling the truth" we call "lying." "Lying" has a social meaning if (a) it has a well-defined association (here we would imagine negative) and (b) this association is to some degree internalized by people within our community, such that people ordinarily feel some psychological cost if they lie and, all things being equal, they feel the appropriate response to someone else lying. Or again: "throwing trash to the ground" we call "littering." "Littering" has a social meaning if (a) there is a well-defined association with the act of littering and (b) people have internalized that association both with themselves and with others.

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n55. For a more robust definition of social norms, see Philip Pettit, Virtus Normativa: Rational Choice Perspectives, 100 Ethics 725, 751 (1990); see also Jon Elster, Norms of Revenge, 100 Ethics 862, 864 (1990). For a discussion of the difference between norms and meaning, see Lawrence Lessig, Social Meaning and Social Norms, 144 U. Pa. L. Rev. 2181 (1996); Sunstein, supra note 53.

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It should be clear that (a) and (b) don't necessarily run together. Littering is a good example. There was a time when "littering" was just becoming a social issue - when people started discussing its [*1452] social cost - but when people still felt quite unabashed about littering. Eventually, the unabashedness disappeared. After extensive public campaigns, there was not only a clear association with the act of littering (i.e., negative), but more and more, people had internalized that association, such that they felt a cost when littering, and they felt negatively toward those who litter. The same story might be told about smoking. n56

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n56. See Smoking Policy: Law, Politics, and Culture (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

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When (a) and (b) do run together, however, the social meanings they together define function within that society selectively to reward or punish individuals who partake in that action, or inaction, or status. n57 They function, that is, to change the cost of different behavior. If they change this cost efficiently, then they make the benefit of a stigmatized action less then its cost, or, for

a socially desirable action, the benefit more than its cost. Social meanings, that is, function here to supplement the individual cost or provide an individual benefit, so as to induce the individual to behave in one way or the other.

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n57. I discuss this at greater length in Lawrence Lessig, The Regulation of Social Meaning, 62 U. Chi. L. Rev. 943 (1995).

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In this way then, some social meanings solve collective action problems, and thereby help provide collective goods. If a clean environment is a collective good, but providing it presents a collective action problem, then the stigma associated with littering can help provide that collective good. The same can be said about lying. If a community within which trust exists is a collective good, then providing it presents a collective action problem. The stigma associated with lying helps impose a cost on individuals who deviate from the norm of being truthful. Social meanings are semiotic tools for regulating individual behavior, often to help induce individuals to contribute to a collective good's supply.

Social meanings, then, are prices. They are just one of any number of different prices that an action might incur. Battering someone opens oneself up to the cost of criminal sanction; it also opens oneself up to the cost of social sanction. Depending upon who the person is, the costs of the latter could well exceed the costs of the former. But regardless of the person, in most societies, the action exacts both costs.

These structures might be said to constitute the techniques of a community. They also lead us to focus on a central oddity in Post's account. What Post's work does as well as any in First Amendment thought is point to the extremely rich structure of social control that any mature society has. His account of the civility norms highlights just how a society depends upon the social mechanisms of control, [*1453] as well as legal mechanisms of control, and how both function together to sanction deviance within a particular community. His use of material from sociology and anthropology points us to a very rich literature that makes plain the place of each. The two combine to help constrain individuals such that a particular kind of community can be constructed. The state uses both legal and social sanctions to achieve its ends, and it constructs both legal and social sanctions to achieve its ends.

Against this background - against the background of an extremely rich array of techniques used by the state to achieve state ends, some of which succeed by making actions stigmatizing or by invoking existing structures of stigma to increase the costs of these actions - just what the First Amendment is about begins to seem a difficult question. There is the First Amendment of Barnette, with its one "fixed star" - that in our constitutional constellation, "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." n58 But this plainly is not our First Amendment. The state does not stick to legal sanctions; it uses social sanctions and legal sanctions interchangeably. Indeed it sometimes prefers social sanctions, as these are likely to be less expensive. n59 Neither does it stick to existing social sanctions; it works to reformulate these social sanctions

to make them better serve state ends. Social sanctions function by establishing a certain orthodoxy around a given behavior. The state uses this orthodoxy, it helps support it, it relies upon it, and it develops it. Mucking around with what's right and wrong, good and bad, just and unjust, is just one part of what the state does all the time.

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n58. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

n59. See Kahan, supra note 36, at 630-52.

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Post should puzzle this more. For against this background, there's something quite odd about the very particular, and quite narrow, focus of the First Amendment's protections. Throughout Post's account, the story we are told is that the First Amendment's aim is to force the government to remain neutral among these differing conceptions of the good (p. 303), that the government remains neutral when it refuses to sanction, or punish - and here legal sanction is what is meant - speech that deviates from some reigning social orthodoxy.

But against the background I have just sketched, this focus seems both too narrow and too broad. It is too narrow because if the purpose of the First Amendment restrictions were really simply to assure government neutrality in this marketplace of communities, then why may government muck around with the price of membership in these various communities in all the other social-
[*1454] meaning management ways that the government mucks around with social meaning? Censorship through legal sanction is just one technique of social-meaning management; it isn't even plain that it is the most powerful technique. (Indeed, I believe a strong argument exists that in this society, it is one of the weakest techniques of social-meaning management.) Given the range of techniques available for changing the price of various communities, limiting the government's use of this single technique, while not considering at all any of the other meaning-management techniques, is like prohibiting murder by stabbing, but leaving unsanctioned any other kind of killing.

The focus on sanctioning speech is too broad because if there are indeed times when the government should muck around in the market for communities, then it seems just arbitrary that this particular technique - sanctioning inappropriate speech - should be picked out like this. Maybe some cases limiting censorship are quite easy. Punishing criticism of the government, for example, is an effective way to undermine the democratic processes, so a First Amendment that protected criticism makes a great deal of sense. But governmental secrecy is also a way to undermine the democratic process; yet there is no First Amendment bar to government secrets. Even more so with governmental lies. n60 In any case, whatever push there is to ban censorship of governmental criticism, it's not at all clear why that same push carries over to censorship of, for example, pornography. Censorship of pornography might be stupid, or self-defeating; but considering it the same as censorship of antigovernmental speech is bizarre.

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n60. Lying, for example, is what the government did to justify its atomic bombing of Japan. See, e.g., Gar Alperovitz, The Decision To Use the Atomic Bomb and the Architecture of an American Myth 421-668 (1995). Yet lying as a challenge to government speech is an underdeveloped constitutional domain. See Mark G. Yudof, When Government Speaks: Politics, Law, and Government Expression in America 6-10, 51-66 (1983); Richard Delgado, The Language of the Arms Race: Should the People Limit Government Speech?, 64 B.U. L. Rev. 961 (1984).

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If what gets the First Amendment talk going is this focus on neutrality - on this idea that the government somehow stands neutral in this "market" where individuals are asked to join, or defect from, certain communities - then this debate makes sense only if you are the sort who is blind to the ways in which social sanctions are sanctions just as legal sanctions are, and blind to the ways in which the state, consistent with the narrow First Amendment, uses social sanctions all the time. If you believed that legal sanctions were fundamentally different, if you believed that the state only played a role through legal sanctions, if you believed that the effect of legal sanctions was equal regardless of viewpoint, then you might think that this anticensorship doctrine made sense. [*1455]

But Post can't believe this. Thus for him it should be a more difficult question, just why the First Amendment doctrine is as narrow as it is. Put another way, if domains were really distinct, and if governmental neutrality were really the objective, then it is not clear why protecting speech in each domain is the way to secure governmental neutrality. Maybe in the democracy domain, the government can't muck around with speech without undermining the very purpose of democracy. But it is not clear why neutrality would mean anticensorship in the community domain. As long as a right of exit - even just dialogic exit - exists, nothing yet shows why communities can't censor. Censorship, within the community, is just shaming by other means.

C. Civility and Change

The government uses social meanings to advance its goals; it acts to construct social meanings to advance its goals. All of this is somehow off the First Amendment's screen. Though the focus of the First Amendment is said to be neutrality, the effects of these acts on free speech neutrality are ignored. This omission may be forgivable. No one yet has made sense of this generality of governmental speech regulation. n61 First Amendment focus has always been on the narrower question of censorship. Why change now?

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n61. The best accounts of the government speech question are: Yudof, supra note 60; Steven Shiffrin, Government Speech, 27 UCLA L. Rev. 565 (1980).

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But even here there are questions to raise. We can see the point by considering the limitations on the state's ability to enforce what Post calls

"civility rules." The common law, remember, had a relatively elaborate structure for enforcing rules of civility in speech and action; many of these rules have been eliminated by the First Amendment. The government, the argument goes, must remain neutral among perspectives; it remains neutral by denying to any particular perspective the power of the state to enforce its view of what is "civil." Instead, these are battles to be waged exclusively on the social field, through voluntary actions at least at the level of speech.

The picture here is essentially volunteerist. Communities get built, this picture suggests, through the voluntary associations of individuals; individuals scan the field and enter the most attractive clubs; and against this background, all the Constitution must do is preserve a certain space for individuals to say their piece. Once they say their piece, the communities they would endorse can construct themselves. But that they can say their piece, without fear of governmental sanction, is all the Constitution must require. [*1456]

Speech has the most important place in this account. It's not that the individual must always be given a space to do whatever he wants; only say (p. 190). Even more limited than that, what's required is that she be given a space where the state will not use its power to punish her for saying whatever she wants to say, though of course, others in the community may punish her for what she says by disassociation, or scorn. All that the Constitution requires is that one single lifeline of free speech be preserved - the constant power to say, against the community, that a different way of living should be adopted.

This lifeline translates into a space where the individual may be "uncivil" - where the individual may flout the norms of the community, as a way to get the community to rethink its norms. The picture here is of Robert Paul Cohen - a draft protester, stepping outside society's terms of decency, as a way to highlight the indecency of that society. n62 The idea is that by preserving this space for individual dissent, by constitutionally protecting the right of the uncivil, we will protect this market in communities, always allowing a deviant way to bid for a new society. The right to be uncivil, then, is understood as a way to make society more transformative.

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n62. See Cohen v. California, 403 U.S. 15 (1971).

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But this is not a complete account; the right to be uncivil is not unambiguously a power to transform. The association is a mistake, though we should be careful in excavating just what the mistake is.

Post's picture has two parts - one of the unencumbered individual simply selecting which community to join; and the second the noble protester, protected by the First Amendment to stand outside civility the better to gain the attention of the community-selecting soul. We could question each, but I want to start with the second. It should be a question whether - not an assumption that - all, or most, or the most significant uncivil speech really functions like this. For against the picture of Cohen we can place the picture of the KKK - not the KKK marching in Skokie, but the KKK marching in Selma. What is uncivil speech of the KKK in Selma, say, in 1954, doing?

To answer this we should return to the account of social meaning sketched above. Recall that as well as solving collective action problems, social meanings are themselves collective goods. They require, to function, collective action, both in ascribing a certain meaning to a certain action, and in behaving "appropriately" in response to that action. Enough must shun, or scorn, the person who lies, or litters, for lying and littering to be social meanings; but this act of shunning, or scorn, requires work. It takes the collective [*1457] work of many individuals. For a social meaning really to function as a social meaning, we all, or most of us, must do something.

Put this way, we might begin to wonder, just how do these things work anyway? If it takes effort, why do we see it? Why, especially given that these goods, these social meanings, are themselves public goods: if they exist for any, they exist for all. So if public goods, why is it that people contribute to their supply? For we might imagine the forgiving sort - the person who, when confronted with behavior that has a negative social meaning, forgives the person who has misbehaved. n63 That person might reason like this: I agree that the social meanings of our society are good ones, that they ought to exist and ought to direct behavior; but they will exist whether or not I contribute to their supply. If they don't exist, then my contribution won't make them exist; if they do exist, then my one noncontribution won't take them away. I can simply free ride off of everyone else's contribution here. I can just forgive the person who misbehaves.

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n63. This is not to say that forgiveness is improper. It is indeed sometimes proper; but the point is that it can be improper as well. See Martha C. Nussbaum, Equity and Mercy, 22 Phil. & Pub. Aff. 83 (1993).

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Forgiveness might be its own virtue, and we might imagine cases where people ought to forgive each other. n64 But it is clear that if everyone reasoned like our forgiving sort, pretty soon there wouldn't be many social meanings that had any negative bite. Something must induce the forgiving sort not always to forgive, but sometimes to condemn, just as something must induce the indifferent sort not always to ignore socially good behavior, but sometimes to praise. Something must induce them to contribute, that is, to the construction of this social meaning, or else this social meaning will no longer survive.

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n64. Perhaps the clearest case is forgiveness against one's own interest. Here at least, the motives for forgiveness seem clearly to be something other than evading the social responsibilities of a particular social norm.

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What induces individuals to contribute to the supply of a social meaning is what we might think of as a second-level social meaning, a social meaning about whether one should contribute to the supply of a social meaning. For if there is a social meaning about improperly forgiving, then there is a cost suffered by an individual when he or she improperly forgives. It is not just that individuals are to shun those who violate social rules, but they are also to shun those

who fail to shun. Primary social meanings may direct how people ought to behave; but secondary social meanings direct how people ought to behave when others fail to behave.

It is here then that we can see the ambiguous role that uncivil speech might play. Post's vision is that uncivil speech is a way to help break up an existing community, that it is a bid for a different [*1458] community, and that this sort of bidding ought to be protected. But uncivil speech could as well be, not a bid for a different community, but a threat to help cement an existing community. If community is just that place where social meanings exist, and if social meanings exist only when supported by punishments, then what uncivil behavior might be is a way of punishing those who are beginning to defect from the proper social meanings. Then uncivil speech functions to entrench, not disentrench, social meanings.

Think again about the ambiguity of uncivil speech by the KKK. I describe for you the fact that the KKK has burned a cross on someone's land. What is that action doing? Well, we might imagine two very different communities: one a community in the pre-Civil Rights Movement South - say, 1961 Selma; the second, Skokie. In the second community, I might - though with a big leap of faith, I will confess - agree with Post about what this burning does. It is a bid for a different community. n65 A hateful, and thoroughly discredited community, but a bid for a community where non-whites, or non-Christians, or gays and lesbians, have a different social status just because of that fact. To protect uncivil speech in Skokie might be a way to protect the right of some minority to say: "Hey, America, let's try it this way." It might be Cohen, though an extremely repulsive Cohen.

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n65. See Steven H. Shiffrin, Racist Speech, Outsider Jurisprudence, and the Meaning of America, 80 Cornell L. Rev. 43, 87 (1994) (discussing whether racist speech makes a contribution to public dialogue).

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But this is not the function of the cross-burning in 1961 Selma. Cross-burning in 1961 Selma is a way of reasserting a dominant social meaning of inequality. It is a way of reminding a swaying community of social meanings that already exist. It is a way of adding a coercive force to those existing social meanings, to support them when stigma is giving out. Here the function of the uncivil speech is to entrench, not transform, an existing society. It is a bid to entrench that society by adding a threat of force behind the already existing stigma associated with nonracist behavior. This threat might fail, and our confidence that it will fail may lead us to ignore it. But its function, and role, are different.

What is left out of Post's account is precisely this difference. "Uncivil" speech has a role, but its role is not always to bid for a different community. And the same point can be made about his treatment of the meaning of state intervention to suppress uncivil speech. This too can be ambiguous, but Post treats it as unitary. Post's picture is again Cohen - the police arresting Cohen, or Bull Connor's dogs in Birmingham. Again, the state's intervention means the suppression of dissent, a way for the majority to achieve dominance over this dissent. [*1459]

But what of Eisenhower's troops in Little Rock? Or the federal troops resisting George Wallace at the University of Alabama? Here the meaning of the state's intervention is quite different. The meaning is about the validation of one fundamental value - equality - rather than the suppression of another - free speech. It is not about supporting a dominant view; it's about protecting a minority's interest.

These examples underline the differences in meaning that state action can have. Sometimes entrenching of the status quo; sometimes disentrenching. This difference Post doesn't account. n66 But it might seem that this does not undermine Post's basic point - the claim that the government must remain neutral in this marketplace of community-building (p. 138). Even if it is true, that is, that sometimes uncivil speech is directed at preserving the status quo, and that sometimes uncivil speech is directed at transforming it, the state, in allowing all such uncivil speech, is remaining neutral between preserving and transforming social contexts (p. 10).

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n66. Post does distinguish the rule's being the expression of the general view from its being the expression of a view "hegemonically imposed by one dominant cultural group onto others," but he hasn't distinguished the role of a rule that expresses a general view or a hegemonic view from one expressing a just view rightfully imposed. P. 67.

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There is this formal neutrality. But we should think a bit more before we conclude that in substance, the laissez-faire is also the neutral. For imagine a well-socialized community, where social norms are fully internalized by members of that community. Then think about the difference in the difficulty between making two kinds of changes to this community. One is the change of transformation when some individual or some group decides it wants to change some part of the social norms of that community. The other is the change of preservation when some individual or some group decides it wants to preserve some social norms. Formally, of course, both groups face the same challenge. Both must convince a significant portion of the community to follow them if either is to prevail. But the difference between them is in background mechanisms that support, or resist, the change in each. For what it means to say that a community is well-socialized is just that when individuals begin to defect from the dominant social norms, other social norms intervene to punish them. When an individual begins to act against the dominant norms of the community, other members of the community are to act against that defection, and if they don't act, then others are to act against them for failing to enforce social norms. The act of defecting is costly; and this is a cost built into the very idea of social norms.

Thus when individuals, or groups, act against a prevailing social norm, all things being equal, they suffer a burden that is greater [*1460] than the burden of someone acting to sustain a social norm. For when someone acts to sustain a social norm, the norms of loyalty reward that person. But when someone act to change a social norm, the norms of loyalty punish him. The cost, therefore, of transformation, all things being equal, is greater than the cost of preservation.

Allowing uncivil speech, then, is a way for the state to ratify this difference in the costs of transformation and preservation. Indeed, it might be worse than that. It might be that the benefit of uncivil speech is greater for the preservationists than the transformationists, though of course this is an empirical question. Empirics notwithstanding, it is quite plausible - indeed, it is the history of our country - that the uncivil speech is more effective in frightening people into the status quo than it is in shocking them out of the status quo. The free speech dissident is a romantic figure in constitutional lore, but his actions were probably not as effective as the threats of the norm-enforcers in the South.

Thus there is this background against which this formal neutrality that Post describes must be evaluated. While the state may be formally neutral when it refuses to punish uncivil speech that is transformative as well as uncivil speech that is preservative, the effect of this neutrality may be quite different between these two objectives. Uncivil speech is more likely the tool of choice for status-quo-preserving social norms than it is for status-quo-transforming social norms; and hence the effect of protecting uncivil speech is to further burden the efforts at transformation. Formal neutrality notwithstanding, the effect of this rule is further to preserve the status quo.

Now I am the last person who can complain that Post's account here is too simple, not sensitive enough to a difference in the kinds of uncivil speech that there are. Given my complaint above about borders, it is of course an unbelievably difficult task to distinguish the transformative from the entrenching. No dunderhead rule could describe it, and I am not convinced that in the abstract the difference should matter. Indeed, one need not be a pure Burkian to understand that there are lots of good reasons why the status quo should be difficult to change. Or at least we can identify aspects of the status quo that we would want to make difficult to change. We can neither criticize in the abstract the difficulty of changing the status quo, nor can we identify a clear rule that would help distinguish status-quo-preserving from status-quo-transforming speech.

Nonetheless, there are two points that I think are important that might come from this point about the difference between transforming and preserving speech. The first is about constitutional law generally. If the experience of post-Communist constitutionalism [*1461] has taught us anything, it has taught us that this difference is a source of an important gap in constitutional theory. For ordinarily we think of a constitution as an entrenching device. We think, that is, that what a constitution is to do is entrench a certain way of being. The image is of Ulysses and the mast: the idea is that we need a constitution to bind us to our most important values; we need a way to restrict ourselves from doing what in our more reflective mode we believe we shouldn't do.

But this is not all that a constitution does. For sometimes a constitution is designed not so much to preserve the status quo, as to change it. Sometimes it is designed not to entrench a certain way of being, but to dislodge it. This, for example, is what constitutionalism in post-Communist Europe is about. The constitutions in post-Communist Europe are not designed to entrench a certain social order, or way of being; they are designed to change an order or way of being. Their aim is to remake a social order, to change patterns of thought constructed by fifty or seventy years of communism, and to change these habits of the heart into patterns that would support constitutionalism. How this is

done is an extremely difficult question, but from what I've said so far, it should be clear just what sort of question it is. For this effort at constitutionalism in post-communist Europe is an effort at transforming something about the social order in post-Communist Europe. It is an effort at changing the social meaning of various institutions in the post-Communist democracies, not an effort at entrenching certain institutions.

What should be obvious is that the techniques of this transformative constitutionalism are not necessarily the same techniques as the techniques of codifying constitutionalism. How a constitution codifies certain practices of social life may well be different from how it sets up the conditions for changing them. More importantly, techniques for codifying practices of social life may well make impossible techniques for changing them.

Constitutionalism in general hasn't thought enough about the differences between these two kinds of constitutionalism, nor enough about how to integrate them. Post's approach here, like constitutionalism generally, is not sensitive to the differences that transformative constitutionalism might make. n67 While this fault, if it is a fault, doesn't distinguish him relative to other constitutionalists, it does matter, I want to suggest, to his own account in one extremely significant way.

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n67. This is not to say that Post doesn't see the difference at all. He is sensitive to the common law's objective as either to "shape and alter social norms" or to "maintain social norms," but he is quick to see the codifying as the "rationale" of the law, and leave aside the possibility of a transformative rationale. P. 65.

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[*1462]

This is the second point that might follow about the difference between transformative and preserving speech, and it ties most directly to what is, in my view, the weakest chapter of the book - the last, the "reprise." Here Post addresses what is for us one of the most difficult First Amendment problems - hate speech. His approach is extremely careful, and sensitive, and conditional: he has no firm conclusion about whether hate speech should be regulated, because he fully well understands the strongest reason to regulate such speech. This is the concern that a history of racism has destroyed the preconditions for responsive democracy (pp. 320-21). A significant segment of society, whether defined on racial or gender lines, is alienated from the dominant discourse of American democracy. This alienation makes it impossible for these Americans to participate on equal terms within a responsive democracy. n68 If that is so, then it might well be proper to take steps to eliminate this alienation, even if these steps are inconsistent with the individualist principles of the American First Amendment tradition.

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n68. See p. 119 ("Public deliberation cannot achieve its purposes if it is "considered or experienced as coercive, or invasive, or otherwise a violation of one's identity or freedom.' ") (quoting Frank Michelman, Law's Republic, 97 Yale L.J. 1493, 1527 (1988)).

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Post has not written a brief, and that's the beauty of the book. One feels the struggle in his thought as he works through the problem. But something is missing from the account. As he fully well acknowledges that a compromise in these First Amendment principles might be necessary, he simultaneously speaks as if this compromise would be a profound loss. If we narrowed the range of possible communities that the Constitution allows us to select among, this would be a loss of great constitutional moment. The writing makes one feel as if integrity is on the line; that we will forever be marked as compromised, or fallen, if we take steps to close off certain communities from the possible communities that American democracy might select among.

But when one asks just what we would lose, this pathos begins to fade. I understand what it means to say we would lose something if communitarians weren't free to try to sell the life of community, or if Republicans weren't free to try to sell the life of the Contract, or if Baptists weren't free to try to sell the life of Christianity. I understand that loss, even though I could never imagine myself a communitarian, or Republican, or Baptist. When I think of these groups, of the world they want to construct, I am angry, or frustrated, or antagonistic; but I understand the importance of keeping space open for these visions, and this passion.

But when I think of the community the KKK wants me to imagine, none of that tolerant fuzziness remains. I confess, I really don't see what we lose by giving up the option of the political community [*1463] that the KKK wants us to embrace. I don't see what we lose, because I think we've seen enough in this debate.

A comparative might make the point more strongly. Germany is a mature constitutional democracy; indeed, I would suggest, more mature in some ways than our own. They have a free speech principle that has functioned effectively to limit the government's ability to regulate speech. But it is a principle that has an important exception: Germany thinks of itself as a "militant democracy," which means it believes it must not only assure democracy, but assure the conditions of democracy. n69 It rejects the idea that a "spontaneous ordering" (p. 194) will assure that the conditions for democratic thought will exist, or survive, on its own. It doesn't believe in the invisible hand when applied to the conditions of democracy. Instead, the German constitution is explicitly directed against certain views of the community that are inconsistent with principles Germany declares that it holds fundamental. Those views of the community have been taken off the table in Germany. Nazism in particular is not a permissible form of life in Germany; it is not an option under the German constitution. That is not to say that Germany will never embrace fascism again; it is just to say that if it does, it will not be under the existing constitutional regime.

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n69. See David P. Currie, The Constitution of the Federal Republic of Germany 213-27 (1994) (describing the principle of "militant democracy").

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One might look at this narrowing of the political options under the German regime and regret it. One might think, that is, that some principle of democracy has been lost by this limitation. That the "logic" of democracy, or free speech, has been violated. But again, I can't muster that thought. It seems to me perfectly just, and eminently rational, for Germany to say to itself, and commit to itself, that it rejects this form of community. It seems to me perfectly just, not because in general I think putting a form of community off the table makes sense, but because I know something - maybe not much, but something - about recent German history. Against this background, it seems to me perfectly just for Germany to promise itself, and the world, that that nation it will never again be.

That promise is a form of transformative constitutionalism. n70 It is a technique for identifying a pathology in the existing social structures of a constitutional democracy, and for taking steps to eliminate those structures. It is a kind of therapy, which works to undermine the pathology identified. It is about making the nation something other than it was.

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n70. The approach is explored in Ruti G. Teitel, Transitional Justice (forthcoming 1997).

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[*1464]

This goal of Germany, to eliminate the fascist in its soul, is a good one. The only question one might have is whether the means chosen to that end are effective. The end justifies the means (what else would justify the means?), and the end of becoming a Kantian nation seems to me, for Germany, perfectly just.

Germany is more than an example. One might think that we too have had a transformative moment in our own constitutional history. That was the Fourteenth Amendment. One might, that is, understand the Fourteenth Amendment to be a similar self-acknowledgment of a pathology in the American soul. n71 One might then understand it as an effort in transformative constitutionalism. To the extent that it identifies a particular kind of transformation that we as a nation have committed ourselves to, it represents as well a reason to think differently about constitutional principle as it relates to this chosen therapy. It gives us a reason, that is, to understand the regulation of hate speech not as we understand the regulation of speech about communism, or anarchism, or republicanism, n72 but rather to understand the question of hate speech the way Germany understands the question of fascism. n73

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n71. This is the argument of Kenneth Karst, pointed to by Post. See p. 305; Kenneth L. Karst, Citizenship, Race, and Marginality, 30 Wm. & Mary L. Rev. 1 (1988).

n72. These three domains of speech have, of course, all been historically regulated. See, e.g., Dennis v. United States, 341 U.S. 494 (1951) (communism); Gitlow v. New York, 268 U.S. 652 (1925) (anarchism); New York Times Co. v. Sullivan, 376 U.S. 254, 273-76 (1964) (discussing Sedition Act of 1798).

n73. Cf. Akhil Reed Amar, The Case of the Missing Amendments: R.A.V. v. City of St. Paul, 106 Harv. L. Rev. 124 (1992).

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I understand that this is inconsistent with some high principle of liberalism. I suspect that the ACLU would not be proud of this weakness of will in a card-carrying member of that organization. But I understand the ACLU's disappointment to be because the ACLU's conception of the First Amendment is just the conception that Post is attacking. Its conception is that the principles it identifies must be carried everywhere in just the same way, or else something has been compromised. Its conception is that there is one free speech principle, and its crusade is to extend it to as many places as possible.

That isn't Post's view, and it is not mine either. The First Amendment should extend in ways consistent with just social understandings of widely different domains. It should extend so as to give individual and democratic space. It should extend to construct a certain life. But I no more understand why it must extend to all sorts of hate than I understand why it must extend to the President's press secretary's right to disagree with the President. I don't understand, that is, why, as a matter of principle, we could not self-
[*1465] consciously decide that the principle must be limited, if the social meaning of equality is to be achieved.

We might, of course, not have so decided. We might not have decided collectively, in a proper way, that equality norms should inform, or alter, speech norms. Or it might just be that limiting speech is a stupid way to bring about this equality. n74 We have learned a lot recently about that question. I never would have thought, for example, that someone would say that in America in 1995, the harm of being discriminated against because one is a white male is the same as that of being discriminated against because one is black. Nonetheless, people say this, and many believe it, and it might just be the deep pathology of American racism that this kind of belief cannot be ignored. That all might be. But that it seems to me is an empirical question, not a matter of first (amendment) principle. Which means that we should be thinking about how we integrate this transformative ideal into our constitutional regime, not how we ignore it.

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n74. See Shiffrin, supra note 65, at 102-03.

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That we ignore it should be plain. The Fourteenth Amendment, rather than standing for this principle of transformation, is slowly becoming the charter of the status quo; n75 rather than especially empowering Congress to act to transform the status quo, to remake the society and social meanings that one might think pathological, it is quickly becoming the principle that says that any effort at remaking the status quo is unconstitutional. Rather than the Fourteenth Amendment modifying the First, the First has modified the Fourteenth.

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n75. See, e.g., Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

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Unitary constitutionalism will not see these points differently. Unitary constitutionalism will understand all effort to regulate speech the same way. What is surprising about Post here is that while he is not unitarian about domains, he is a unitarian about purpose. There is a principle to keep as much on the table as possible; this, he suggests, is the principle of democracy. One hundred and thirty years after the Civil War, one wants to know just why.

D. Federalism and Community

There's a picture of America at the founding, somewhat naive, fundamentally crude, but useful nonetheless. The picture is something like this: America at the Founding was composed of small towns, villages really, that peppered a vast expanse of territory. The largest city at the Founding was New York. Its population was [*1466] 50,000. n76 The distance between the nation's two largest cities, New York and Philadelphia, was ninety miles. That took several days to travel. America at the founding was like imagining a nation today composed of the nations of Switzerland, Georgia, Russia, and Japan.

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n76. See Donald B. Dodd, Historical Statistics of the States of the United States 454 (1993).

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This fact of relative isolation mattered. It mattered because it aligned "what was possible" with "what was desirable." We think of the Framers as having chosen a relatively decentralized federalist structure; but it is not clear just what more they could have done. In a world as decentralized as the framing world was, it was not just undesirable to centralize authority in the federal government; more importantly, it was just unfeasible.

A similar coincidence - of the feasible and with the desirable - touches this issue of community. In the sense that Post means community, community at the founding was local, and geographical. "Connectedness" was local - one knew, and worked, and socialized, and struggled with people nearby, because anything else was impossible. There were dimensions along which people were within the "national" community, but not many.

This fact fits with, and makes sense of, the original division of legislative jurisdiction, and constitutional right. For again, at the local level, communities had the power to regulate broadly, in ways that would be constitutive of a certain kind of community, while at the national level not. At the national level the Constitution limited the federal government in ways it did not at the local level. The First Amendment, in particular, limited the federal government, and not the states.

The difficulty for American constitutionalism, then, is that this fundamental fact of the framing context - this relative isolation - has changed, and it is the fundamental challenge of American constitutional interpretation to accommodate this change. Whether desirable or not, it is now feasible to regulate most everything at the national level; whether desirable or not, it is less feasible to constitute communities by regulating at the local level. The challenge for constitutionalism is how to account for this change, while preserving something of the framing balance.

The change is fundamental for the concerns that Post raises. For if "community," in the sense that Post means, fit the reality of a local political community - when, in other words, connectedness was local, and hence community was geography - then it made sense to grant the local political community special status in its power to regulate individuals within its jurisdiction. But to the extent that local political communities have no real connection with [*1467] "community" - to the extent that connectedness is no longer geographic - it makes less and less sense to grant the local political community special status in its power to regulate individuals within its jurisdiction. Lincoln may have been from Illinois, but Illinois is just where I live.

The history of American constitutionalism is in part the history of this accommodation - the accommodation to this changing predicate of isolation. In the powers context, the change has extended federal power broadly, with limited efforts to rein it back in. n77 In the First Amendment context, the response has been to treat all governments like the federal government. Even if the framing understanding allowed a wider range of democratic control at the local level over the nature and construction of community, what incorporation has come to mean is that government at the local level is no different from government at the national level. There is one First Amendment, and it applies without distinction from the highest to localist levels of government.

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n77. I develop this idea in the context of federalism in Translating Federalism: United States v. Lopez, 1995 Sup. Ct. Rev. 125.

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This has meant a certain confusion. For it is not as if this one First Amendment applies so as to force the government to be neutral - in the sense of not affecting which outcome, or which community, prevails - at either the national or local level. As I said above, the government is limited in its power to censor, but one can muck around with a speech or a community market in more ways than censorship. Nor is it as if this one First Amendment successfully channeled traditionally local speech regulation to the local level, and national speech regulation to the national level. This is an era when those most forcefully pressing "states' rights" are also those most eager that the national government promote "family values." n78

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n78. See, e.g., Contract with America (Ed Gillespie & Bob Schellhas eds., 1994).

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The real change in the constitutional landscape brought about by these shifts is the shift between public and private regulation of speech. Of course no strong limitation on the power of localities to regulate speech existed at the Founding; local democracies could then constitute communities as they saw fit. While the First Amendment now would reach these governmental efforts at the construction of community, most such construction is now private, and hence without the reach of the First Amendment. Hence, from one perspective, one might believe that the existing constitutional regime is in effect equivalent to the original, since, as with the original, the locus of community-building is outside the scope of the First Amendment. [*1468]

The difference, of course, is that this new locus of community-building is also outside the scope of democratic control. It is private, not public, and hence free from both constitutional constraint and democratic constraint. Not that the original regime could be thought fundamentally democratic; its democracy was of course quite flawed. But clearly the new regime disables democratic efforts in reconstructing community, at least so far as they employ certain proscribed First Amendment means.

One might have thought this result inevitable; that there would be no way for incorporation to extend the limits of the First Amendment outside the reach of government, and hence the consequence that most regulation of speech is private and outside the scope of the First Amendment was, in some important sense, unavoidable. But as Richard Ford has well argued, as a historical matter, this was in no sense obvious, or compelled. n79 For originally, "corporations," whether commercial or municipal, were the same sort of creature; both equally the construction of government; both equally subject to whatever limitations extended to government. Given this common origin, what begs explanation is just why one of these original "corporations" is considered a state actor, and the other not.

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n79. See Richard Thompson Ford, The Boundaries of Race: Political Geography in Legal Analysis, 107 Harv. L. Rev. 1843, 1879-80 (1994).

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This is not the place to resolve these oddities. But what they, and the federalist structure they result from, suggest, along with the account that Post offers, are a few uncomfortable thoughts that will not resolve themselves easily within this constitutional regime. The first thought is that speech regulation, or as I would call it, social-meaning regulation, has been a permanent feature of social and political life; all that has changed is the locus of that regulation. To the extent that the framing regime endorsed a decentralized and local form of social-meaning regulation, that value of federalism might be one that continues to inform the decision about who should have this power of regulation. But the uncomfortable fact is that it is a decision, not compelled by the original structure, and not well-executed in the existing regime. From a federalist perspective, one may well believe that too much of this social-meaning regulation goes on at the federal level, and that too little goes on at a level corresponding to the connectedness of the community. Likewise, to the extent that there is regulation at the level of the community, one might

well question the extent to which this is regulation outside democratic control.

The difficult question for the present constitutional regime is just why self-conscious efforts by democratically responsible agents to redefine social meaning are constitutionally problematic, while [*1469] self-conscious efforts by agents democratically irresponsible to redefine social meaning are not. Why is it that when you add democracy into the bargain the mix turns sour, but when the market is the bargain, the mix is perfectly sweet?

Conclusion

There's no single principle of free speech; there are a collection of understandings. This collection is not expressible in any single phrase; it is instead like a code, applying differently in separate spheres of social life. This collection of principles is who we are - they are for the most part invisible; they for the most part function invisibly; and they for the most part limit governmental action in ways plainly understood. Yet despite this collection of understandings, despite this multiplicity, despite this invisibility, constitutional law insists on a single vision. It insists on a single principle that might make this social understanding appear like law, on a principle that might make it function like law - like a simple constitutional text, with determined directness. It is understandable why constitutional law so seeks. For if it is to function to constrain, if it is to have the capacity to impose on others, if it is to impose this principle through the tools of courts, then this simplicity, this directness, is just what constitutional law needs. It needs, that is, a way to deny the complexity that it also is.

The power of Post's book is that it compels us to see the complexities of First Amendment life - it compels us to see, that is, the divergent modalities of free speech regulation. The free speech principle that makes most sense of who we are is one that applies differently in these different domains; it is one that can limit itself according to these different domains. What we need then is some tool for tracking these domains, and selecting a body of principles based on these domains. Interestingly, perhaps accidentally, the framing structure gave us something of this. It left the places of community free to regulate, while limiting governmental power in the places that were not community. But that structure rested, we might say, upon a fact of isolation; and as that fact of isolation has disappeared, this structure could no longer be sustained. The frictions of social life before kept separate these different domains of regulation, and as these frictions have disappeared, this separation has disappeared as well.

What is needed, then, is a new tool for keeping separate the regulation of these different domains. As Meir Dan-Cohen might say, what is needed is a device for keeping acoustically separate the regulation of these different domains, so that the rules of one need [*1470] not necessarily be relied upon in the other, so that the optimal mix of rules for both might be obtained. n80

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n80. See Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625 (1984).

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It might be that the clumsiness, or crudeness, of current First Amendment doctrine is just such a device. n81 But to know that would require much more analysis. What we can say is that it is not obvious that the solution to the current clumsiness is simply to be more open about the conflict of values that these separate domains might entail. Transparency is a solution only if the transparent institution can deal openly and effectively with the conflict that transparency reveals. But this is not what this Court, or this judiciary, can do. We have been shown that the problem is more complex than the doctrine pretends; we have not been shown that it is not too complex for this legal culture to handle.

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n81. This may be the best implication to be drawn from Elena Kagan's account of the motivating purpose behind First Amendment policy generally. Her argument is that an effort to screen improper governmental intent is behind much of First Amendment doctrine, even though none of the First Amendment doctrines directly pursue this end. The doctrines then may be the necessarily indirect devices for pursuing this end that could not be pursued directly. See Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413 (1996).

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[cp8,9 This Index includes articles, comments, and some of the longer notes and recent developments that have appeared in leading reviews since the publication of the last issue of this Review.

ADMINISTRATION OF JUSTICE

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See Indians, Judicial Review.

ADMISSIBILITY OF EVIDENCE

See DNA Fingerprinting.

ADVERTISING

Environmental marketing and federal preemption of state law: eliminating the "gray" behind the "green." 81 Cal. L. Rev. 991-1027 (July).

AIDS

See Discrimination.

AIR POLLUTION

OSHA's air contaminants standard revision succumbs to substantial evidence test: AFL-CIO v. OSHA. 62 U. Cin. L. Rev. 351-92 (No. 1).

ALIENS

The constitutionality of INS pre-hearing detention of alien children: Flores v. Meese. 62 U. Cin. L. Rev. 217-46 (No. 1).

APPELLATE PROCEDURE

See Class Actions, Sentencing.

ARBITRATION AND AWARD

Understanding the limits of court-connected ADR: a critique of federal court-annexed arbitration programs. Lisa Bernstein. 141 U. Pa. L. Rev. 2169-259 (June).

ARNOLD, RICHARD S.

A tribute to Chief Judge Richard S. Arnold. Commentary by William J. Brennan, Jr., John P. Frank & A. Leon Higginbotham, Jr., Donald P. Lay, and Patricia M. Wald. 78 Minn. L. Rev. 1-59 (Nov.).

ASYLUM

Elias-Zacarias: result-oriented reasoning and the Rehnquist Court's preclusion of asylum claims based on political neutrality. 39 Wayne L. Rev. 1385-409 (Spring).

ATTORNEYS

See Dispute Resolution.

BANKRUPTCY

When cities go broke: a conceptual introduction to municipal bankruptcy. Michael W. McConnell & Randal C. Picker. 60 U. Chi. L. Rev. 435-95 (Spring).

BIAS CRIMES

Ethnic intimidation statutes post-R.A.V.: will they withstand constitutional scrutiny? 62 U. Cin. L. Rev. 113-71 (No. 1).

CAMPAIGN FUNDS

Campaign finance reform and the return of Buckley v. Valeo. 103 Yale L.J. 469-503 (Nov.).

CAPITAL PUNISHMENT

Guilty but mentally ill and the death penalty: punishment full of sound and fury, signifying nothing. 43 Duke L.J. 87-112 (Oct.).

CHARITIES

See Income Tax: Deductions.

CHILD ABUSE

See Legal Ethics.

CHILD CUSTODY

Implementing custody mediation in family court: some comments on the Jefferson County Family Court experience. Louise E. Graham. 81 Ky. L.J. 1107-31 (No. 4).

CITIES

See Counties.

CIVIL RIGHTS

The persistence of prejudice: process-based theory and the retroactivity of the Civil Rights Act of 1991. 103 Yale L.J. 567-94 (Nov.).

CLASS ACTIONS

The appealability of class action settlements by unnamed parties. 60 U. Chi. L. Rev. 933-56 (Summer/Fall).

COLLEGES AND UNIVERSITIES

Obscuring the issue: the inappropriate application of in loco parentis to the campus crime question. 39 Wayne L. Rev. 1335-59 (Spring). [*1038]

COMMERCE CLAUSE

Give 'em enough rope: states, subdivisions and the market participant exception to the Dormant Commerce Clause. 60 U. Chi. L. Rev. 615-42 (Spring).

COMPARATIVE LAW

See also Slavery.Autonomous lawmaking: the case of the "Gypsies." Walter O. Weyrauch & Maureen A. Bell. Commentary by W. Michael Reisman. 103 Yale L.J. 323-417 (Nov.).

COMPARATIVE LAW: ENVIRONMENTAL LAW

Parallel universes: NEPA lessons for the new property. Michael Herz. 93 Colum. L. Rev. 1668-737 (Nov.).

COMPARATIVE NEGLIGENCE

Comparative negligence under the Code: protecting negligent banks against negligent customers. Julianna J. Zekan. 26 Mich. J.L. Ref. 125-94 (Fall).

CONSTITUTIONAL AMENDMENTS

Incorporation of the Bill of Rights: Akhil Amar's wishing well. Raoul Berger. 62 U. Cin. L. Rev. 1-36 (No. 1). On misreading John Bingham and the Fourteenth Amendment. Richard L. Aynes. 103 Yale L.J. 57-104 (Oct.).

CONSTITUTIONAL LAW

See also Domestic Relations, Elections, Homosexuality and Lesbianism, Slavery.Justice in plain clothes: reflections on the thinness of constitutional law. Lawrence G. Sager. Commentary by Ronald J. Allen, Akhil Reed Amar, and Terrance Sandalow. 88 Nw. U. L. Rev. 410-68 (Fall).

CONSTITUTIONAL THEORY

See also Constitutional Amendments, Constitutional Law, Judicial Review.The aspirational Constitution. Robin West. Commentary by Steven G. Calabresi, Anthony E. Cook, and Sanford Levinson. 88 Nw. U. L. Rev. 241-95 (Fall). The Constitution, the courts, and the question of minimalism. Michael J. Perry. Commentary by Martin H. Redish, Suzanna Sherry, and Steven D. Smith. 88 Nw. U. L. Rev. 84-192 (Fall). Justice and the text: rethinking the constitutional relation between principle and prudence. Christopher L. Eisgruber. 43 Duke L.J. 1-55 (Oct.). Tradition and insight. Rebecca L. Brown. 103 Yale L.J. 177-222 (Oct.).

CONTRACTUAL BAD FAITH

See Insurance.

CORPORATE ACQUISITIONS AND MERGERS

See Corporations.

CORPORATE OFFICERS

SeealsoCorporations,FiduciaryRelationships.Independent directors and the ALI corporate governance project. Stephen M. Bainbridge. 61 Geo. Wash. L. Rev. 1034-83 (Apr.).

CORPORATE REORGANIZATION

See Corporations.

CORPORATE SOCIAL RESPONSIBILITY

Private law, public interest?: the ALI Principles of Corporate Governance. Lawrence E. Mitchell. 61 Geo. Wash. L. Rev. 871-97 (Apr.).

CORPORATIONS

See also Corporate Officers, Corporate Social Responsibility, Fiduciary Relationships, Stockholder Derivative Actions.The ALI, institutionalization, and disclosure: the quest for the outside director's spine. James D. Cox. 61 Geo. Wash. L. Rev. 1233-73 (Apr.). The ALI's corporate governance project: the death of property rights? William J. Carney. 61 Geo. Wash. L. Rev. 898-953 (Apr.). Corporate takeovers and corporate law: who's in control? Lyman Johnson & David Millon. 61 Geo. Wash. L. Rev. 1177-211 (Apr.). Down the rabbit-hole and into

the nineties: issues of accountability in the wake of eighties-style transactions in control. Deborah A. DeMott. 61 Geo. Wash. L. Rev. 1130-55 (Apr.). Implications of the stakeholder model. Roberta S. Karmel. 61 Geo. Wash. L. Rev. 1156-76 (Apr.). The mandatory nature of the ALI code. Larry E. Ribstein. 61 Geo. Wash. L. Rev. 984-1033 (Apr.). Self-regulation, normative choice, and the structure of corporate fiduciary law. William W. Bratton. 61 Geo. Wash. L. Rev. 1084-129 (Apr.). The transformation of the American Law Institute. Jonathan R. Macey. 61 Geo. Wash. L. Rev. 1212-32 (Apr.). Who's being greedy?: a theoretical and empirical examination of holdouts and coercion in debt tender and exchange offers. 103 Yale L.J. 505-35 (Nov.). [*1039]

COUNTIES

Local government protection of biodiversity: what is its niche? A. Dan Tarlock. 60 U. Chi. L. Rev. 555-613 (Spring).

COURT ADMINISTRATION

See also Courts.Financing and managing the finances of the California court system: alternative futures. John K. Hudzik. 66 S. Cal. L. Rev. 1813-914 (July). The impact of information technology on judicial administration: a research agenda for the future. Robert Anderson, Ellen Borgersen, Paul Brest, William Fenwick & Jefferson Sher. 66 S. Cal. L. Rev. 1761-812 (July).

COURTS

See also Venue.Access to the civil courts for those of low and moderate means. James W. Meeker & John Dombrink. 66 S. Cal. L. Rev. 2217-31 (July). Alternative court structures in the future of the California judiciary: 2020 vision. Lawrence B. Solum. 66 S. Cal. L. Rev. 2121-82 (July). The confirmation mess, continued. Stephen L. Carter. 62 U. Cin. L. Rev. 75-100 (No. 1). From sociological trends of 1992 to the criminal courts of 2020. Candace McCoy. 66 S. Cal. L. Rev. 1967-91 (July). The future relationship of California's state and federal courts: an essay on jurisdictional reform, the transformation of property, and the new age of information. John B. Oakley. 66 S. Cal. L. Rev. 2233-50 (July). Innovation, resistance, and change: a history of judicial reform and the California courts, 1960-1990. Harry N. Scheiber. 66 S. Cal. L. Rev. 2049-120 (July). Planning for the next century in the California courts. Stephen P. Johnson. 66 S. Cal. L. Rev. 1751-60 (July). A report on the independence of the judiciary. J. Clark Kelso. 66 S. Cal. L. Rev. 2209-16 (July). Surveying the future. Elizabeth Ellers. 66 S. Cal. L. Rev. 2183-97 (July). 20/20 vision: the future of the California civil courts. Samuel Krislov & Paul Kramer. 66 S. Cal. L. Rev. 1915-66 (July).

CRUEL AND UNUSUAL PUNISHMENT

See Capital Punishment, Prisons and Prisoners.

DAMAGES

See Employee Benefits, Housing Discrimination, Personal Injuries, Pornography.

DEMOCRACY

See also Judicial Review, Jurisprudence, Sociology.Who's afraid of

deliberative democracy? on the strategic/deliberative dichotomy in recent constitutional jurisprudence. David M. Estlund. 71 Texas L. Rev. 1437-77 (June).

DISCRIMINATION

See also Elections, Judicial Review.Of diagnoses and discrimination: discriminatory nontreatment of infants with HIV infection. Mary A. Crossley. 93 Colum. L. Rev. 1581-667 (Nov.).

DISPUTE RESOLUTION

See also Arbitration and Award, Child Custody, Courts.Arbitral practice and purpose in employee off-duty misconduct cases. 69 Notre Dame L. Rev. 135-56 (No. 1). Building and maintaining a statewide mediation program: a view from the field. Sharon Press. 81 Ky. L.J. 1029-65 (No. 4). Court-annexed arbitration - the Northern Kentucky experience. Christopher J. Mehling & Donald Stepner. 81 Ky. L.J. 1155-63 (No. 4). The development and organization of domestic relations mediation in a multi-function mediation center in Kentucky. Gary W. Paquin. 81 Ky. L.J. 1133-53 (No. 4). Establishing a joint state bar association and Supreme Court commission on alternative dispute resolution. Jack P. Etheridge. 81 Ky. L.J. 1085-92 (No. 4). The neighborhood justice center movement. Edith B. Primm. 81 Ky. L.J. 1067-83 (No. 4). Of the growth and development of dispute resolution. Patrick Fn'Piere & Linda Work. 81 Ky. L.J. 959-75 (No. 4). The quiet revolution comes to Kentucky: a case study in community mediation. Thomas J. Stipanowich. 81 Ky. L.J. 855-958 (No. 4). Reflections on the role of the neutral lawyer: the lawyer as mediator. Karen A. Zerhusen. 81 Ky. L.J. 1165-76 (No. 4). Running statewide dispute resolution programs - the New York experience. Thomas F. Christian. 81 Ky. L.J. 1093-106 (No. 4). State offices of mediation: thoughts on the evolution of a national network. Peter S. Adler. 81 Ky. L.J. 1013-27 (No. 4). Training interveners for ADR processes. Joseph B. Stulberg. 81 Ky. L.J. 977-1011 (No. 4).

DNA FINGERPRINTING

The admissibility of DNA evidence in criminal proceedings. 39 Wayne L. Rev. 1411-32 (Spring). [*1040]

DOMESTIC RELATIONS

See also Dispute Resolution.Do siblings possess constitutional rights? 78 Cornell L. Rev. 1187-220 (Sept.).

DUE PROCESS OF LAW

See Comparative Law: Environmental Law.

EDUCATION: FINANCE

See Schools and School Districts: Finance.

ELECTIONS

See also Representative Government.Challenging criminal disenfranchisement under the Voting Rights Act: a new strategy. 103 Yale L.J. 537-66 (Nov.). Judging politics: the elusive quest for judicial review of political fairness. Samuel

Issacharoff. 71 Texas L. Rev. 1643-703 (June). Race and redistricting: drawing constitutional lines after Shaw v. Reno. T. Alexander Aleinikoff & Samuel Issacharoff. 92 Mich. L. Rev. 588-651 (Dec.). Relationships of representation in Voting Rights Act jurisprudence. Kathryn Abrams. 71 Texas L. Rev. 1409-35 (June). The rights to vote: some pessimism about formalism. Pamela S. Karlan. 71 Texas L. Rev. 1705-40 (June). Save the baby, change the bathwater, and scrub the tub: Latino electoral participation after seventeen years of Voting Rights Act coverage. Rodolfo O. de la Garza & Louis DeSipio. 71 Texas L. Rev. 1479-539 (June). Who rules at home?: one person/one vote and local governments. Richard Briffault. 60 U. Chi. L. Rev. 339-424 (Spring).

ELECTRICITY

The choice between markets and central planning in regulating the U.S. electricity industry. Bernard S. Black & Richard J. Pierce, Jr. 93 Colum. L. Rev. 1339-441 (Oct.).

ELECTRONIC SURVEILLANCE

Title III at a crossroads: the ordinary course of business in the home, the consent of children, and parental wiretapping. 141 U. Pa. L. Rev. 2261-310 (June).

EMPLOYEE BENEFITS

Trading places: employer strategies to avoid mandatory awards of interest, liquidated damages, and attorney's fees under the MPPAA. 78 Minn. L. Rev. 229-57 (Nov.).

EMPLOYER AND EMPLOYEE

See Dispute Resolution, Labor Disputes.

EMPLOYMENT DISCRIMINATION

Filling an enforcement void: using testers to uncover and remedy discrimination in hiring for lower-skilled entry-level jobs. Michael J. Yelnosky. 26 Mich. J.L. Ref. 403-84 (Winter).

EMPLOYMENT DISCRIMINATION: AGE

The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: three acts and a dog that didn't bark. Howard Eglit. 39 Wayne L. Rev. 1093-216 (Spring).

EMPLOYMENT DISCRIMINATION: GAYS AND LESBIANS

Reorienting the workplace: examining California's new labor code section 1102.1 and other legal protections against employment discrimination based on sexual orientation. 66 S. Cal. L. Rev. 2297-329 (July). You've built the bridge, why don't you cross it? a call for state labor laws prohibiting private employment discrimination on the basis of sexual orientation. 26 Mich. J.L. Ref. 245-77 (Fall).

ENVIRONMENTAL LAW

See Air Pollution.

ENVIRONMENTAL PROTECTION

See also Advertising, Counties, Intellectual Property.The challenge of indigenous self-determination. Russel L. Barsh. 26 Mich. J.L. Ref. 277-312 (Winter). The EC vs. NAFTA: levelling up vs. social dumping. Sheldon Friedman. 68 Chi.-Kent L. Rev. 1421-26 (No. 3). Lujan v. Defenders of Wildlife: unwarranted judicial interference with congressional power and environmental protection. 1993 Wis. L. Rev. 1337-73 (No. 5).

EQUAL PROTECTION

See Land Use.

ESTABLISHMENT CLAUSE

See also Schools and School Districts.The constitutionality of New Jersey kosher food regulations under the Establishment Clause: Ran-Dav's County Kosher v. State. 62 U. Cin. L. Rev. 246-82 (No. 1). Good faith? religious-secular parallelism and the Establishment Clause. 93 Colum. L. Rev. 1763-806 (Nov.).

EVIDENCE

See Slavery.

EXCLUSIONARY RULE

See Harmless Error.

FAIR USE DOCTRINE

Beyond Rogers v. Koons: a fair use standard [*1041] for appropriation. 93 Colum. L. Rev. 1473-526 (Oct.).

FAMILY COURTS

Children, families, and the courts in the twenty-first century. Gary B. Melton. 66 S. Cal. L. Rev. 1993-2047 (July).

FEDERAL JURISDICTION

See Removal of Causes.

FEDERAL PREEMPTION

See Advertising.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 11 and federal sovereign immunity: respecting the explicit waiver requirement. 60 U. Chi. L. Rev. 1043-70 (Summer/Fall).

FEMINIST JURISPRUDENCE

See Fifth Amendment Protections, Legal Ethics.

FIDUCIARY RELATIONSHIPS

See also Corporations.How should we talk about fiduciary duty? directors' conflict-of-interest transactions and the ALI's Principles of Corporate Governance. Marleen A. O'Connor. 61 Geo. Wash. L. Rev. 954-83 (Apr.).

FIFTH AMENDMENT PROTECTIONS

In a different register: the pragmatics of powerlessness in police interrogation. Janet E. Ainsworth. 103 Yale L.J. 259-322 (Nov.).

FIRST AMENDMENT PROTECTIONS

See also Freedom of Association, Freedom of Religion.Broadcasting and speech. Jonathan Weinberg. 81 Cal. L. Rev. 1101-206 (Oct.). The fighting words doctrine. 93 Colum. L. Rev. 1527-71 (Oct.). Words, conduct, caste. Cass R. Sunstein. 60 U. Chi. L. Rev. 795-844 (Summer/Fall).

FOOD, DRUG & COSMETIC LAW

See Freedom of Religion.

FOREIGN LAW

See Self-Incrimination.

FREEDOM OF ASSOCIATION

Associational rights of major political parties: a skeptical inquiry. Daniel H. Lowenstein. 71 Texas L. Rev. 1741-92 (June).

FREEDOM OF RELIGION

See also Slavery.Kosher food regulation and the religion clauses of the First Amendment. 60 U. Chi. L. Rev. 667-96 (Spring).

FREEDOM OF SPEECH

See First Amendment Protections, Slavery.

FREEDOM OF THE PRESS

See First Amendment Protections, Slavery.

GOVERNMENT

Decentering decentralization. Jerry Frug. 60 U. Chi. L. Rev. 253-338 (Spring).

GOVERNMENT IMMUNITY AND LIABILITY

See Federal Rules of Civil Procedure.

HARMLESS ERROR

Harmless error as constitutional common law: Congress's power to reverse Arizona v. Fulminante. 60 U. Chi. L. Rev. 985-1014 (Summer/Fall).

HATE SPEECH

See also Bias Crimes, First Amendment Protections.Regulation of hate speech and pornography after R.A.V. Elena Kagan. 60 U. Chi. L. Rev. 873-902 (Summer/Fall).

HAZARDOUS WASTE LIABILITY

When less is more: a significant risk threshold for CERCLA liability. 60 U. Chi. L. Rev. 697-723 (Spring).

HAZARDOUS WASTE SITES

See Land Use.

HOME RULE

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HOMOSEXUALITY AND LESBIANISM

Creating controversy: essentialism and constructivism and the politics of gay identity. Daniel R. Ortiz. Commentary by Cheshire Calhoun and Morris B. Kaplan. 79 Va. L. Rev. 1833-902 (Oct.). A history of same-sex marriage. William N. Eskridge. Commentary by Milton C. Regan, Jr. and Nancy D. Polikoff. 79 Va. L. Rev. 1419-550 (Oct.). Litigating for lesbian and gay rights: a legal history. Patricia A. Cain. Commentary by Mary A. Case and Nan D. Hunter. 79 Va. L. Rev. 1551-719 (Oct.). Reasoning about sodomy: act and identity in and after Bowers v. Hardwick. Janet E. Halley. Commentary by Anne B. Goldstein and Kendall Thomas. 79 Va. L. Rev. 1721-832 (Oct.).

HOUSING

Distressed public housing: where do we go from here? Michael H. Schill. 60 U. Chi. L. Rev. 497-554 (Spring). [*1042]

HOUSING DISCRIMINATION

Bona fide damages for tester plaintiffs: an economic approach to private enforcement of the antidiscrimination statutes. 81 Geo. L.J. 2727-70 (Aug.).

HUSBAND AND WIFE

See Electronic Surveillance.

HYPNOSIS

"Trance on trial": an exegesis of hypnotism and criminal responsibility. 39 Wayne L. Rev. 1299-334 (Spring).

IMMIGRATION AND EMIGRATION

See also Asylum.Beyond the rhetoric of assimilation and cultural pluralism: addressing the tension of separatism and conflict in an immigration-driven multiracial society. Bill Ong Hing. 81 Cal. L. Rev. 863-925 (July).

INCOME TAX: DEDUCTIONS

A full spectrum of light: rethinking the charitable contribution deduction. 141 U. Pa. L. Rev. 2371-402 (June).

INDIANS

Chevron and the canon favoring Indians. 60 U. Chi. L. Rev. 1015-42 (Summer/Fall).

INDIANS: NATURAL RESOURCES

See Environmental Protection.

INFANTS

See Aliens, Discrimination, Products Liability.

INFORMED MEDICAL CONSENT

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INSANITY

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INSIDER TRADING

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INSURANCE

The tort of bad faith in first-party insurance transactions: refining the standard of culpability and reformulating the remedies by statute. Roger C. Henderson. 26 Mich. J.L. Ref. 1-68 (Fall).

INTELLECTUAL PROPERTY

Plants, poverty, and pharmaceutical patents. 103 Yale L.J. 223-58 (Oct.).

INTERNATIONAL ENVIRONMENTAL LAW AND PRACTICE

See Environmental Protection.

INTERNATIONAL LAW

See Labor Law.

INTERSTATE COMMERCE

See also Commerce Clause.The undercharge dilemma: how the Interstate Commerce Commission has aided shippers defending against bankrupt carriers. 62 U. Cin. L. Rev. 173-215 (No. 1).

JUDGES

See also Courts.The jurisprudence of Justice Byron White. Allan Ides. 103 Yale L.J. 419-61 (Nov.).

JUDGMENTS

An intent-based approach to the acceptance of benefits doctrine in the federal courts. 92 Mich. L. Rev. 742-73 (Dec.).

JUDICIAL RESTRAINT

See Constitutional Theory, Judicial Review.Judicial review of the administrative record in NEPA litigation. 81 Cal. L. Rev. 929-90 (July).

JUDICIAL REVIEW

See also Constitutional Theory, Elections.Deference to political decisionmakers and the preferred scope of judicial review. Nicholas S. Zeppos. Commentary by Frank H. Easterbrook, William N. Eskridge, Jr., and Thomas W. Merrill. 88 Nw. U. L. Rev. 296-409 (Fall). Name-calling and the clear error rule. Robert F. Nagel. Commentary by Neil K. Komesar, Gary Lawson, and Jonathan R. Macey. 88 Nw. U. L. Rev. 193-240 (Fall). Thayer's target: judicial review or democracy? Mark Tushnet. Commentary by Thomas C. Grey, Stephen B. Presser, and G. Edward White. 88 Nw. U. L. Rev. 9-83 (Fall).

JURISDICTION

See Courts.

JURISPRUDENCE

See also Courts, Democracy, Judges, Legal Ethics, Personal Injuries.Fidelity to pre-existing law and the legitimacy of legal decision. Gregory C. Keating. 69 Notre Dame L. Rev. 1-55 (No. 1). Public choice, civic republicanism, and American politics: perspectives of a "reasonable choice" modeler. Bernard Grofman. 71 Texas L. Rev. 1541-87 (June). Understanding legal understanding: the legal subject and the problem of legal coherence. J.M. Balkin. 103 Yale L.J. 105-76 (Oct.).

LABOR DISPUTES

The NLRA and the duty of loyalty: protecting public disparagement. 60 U. Chi. L. Rev. 643-65 (Spring). [*1043]

LABOR LAW

See also Employment Discrimination: Gays and Lesbians.The impact of the EEC on labor law. Bernd Baron von Maydell. 68 Chi.-Kent L. Rev. 1401-20 (No. 3). The

impact of the European Community on labor law: some American comparisons. Marley S. Weiss. 68 Chi.-Kent L. Rev. 1427-67 (No. 3).

LAND USE

See also Counties.What's fairness got to do with it?: environmental justice and the siting of locally undesirable land uses. Vicki Been. 78 Cornell L. Rev. 1001-85 (Sept.).

LANGUAGE

Lawsuit, shmawsuit. Alex Kozinski & Eugene Volokh. 103 Yale L.J. 463-67 (Nov.).

LAW CURRICULA

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LAW REFORM

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LAW SCHOOLS

See Legal Scholarship.

LEGAL DISCOURSE

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LEGAL EDUCATION

Deconstructing Los Angeles or a secret fax from Magritte regarding postliterate legal reasoning: a critique of legal education. C. Garrison Lepow. 26 Mich. J.L. Ref. 69-124 (Fall).

LEGAL ETHICS

"Bad mothers," "good lawyers," and "legal ethics." Marie Ashe. 81 Geo. L.J. 2533-66 (Aug.). The ethic of care as an ethic for lawyers. Stephen Ellmann. 81 Geo. L.J. 2665-726 (Aug.). Foreword: towards a postmodern ethics of service. Anthony E. Cook. 81 Geo. L.J. 2457-74 (Aug.). Impoverished practices. Anthony V. Alfieri. 81 Geo. L.J. 2567-663 (Aug.). Inconsistent stories. Naomi R. Cahn. 81 Geo. L.J. 2475-531 (Aug.).

LEGAL HISTORY

See also Homosexuality and Lesbianism, Liberty, Slavery.A brief life of James Bradley Thayer. Jay Hook. 88 Nw. U. L. Rev. 1-8 (Fall). "You're gonna miss me when I'm gone": early modern common law discourse and the case of the Jews. Jonathan A. Bush. 1993 Wis. L. Rev. 1225-85 (No. 5).

LEGAL POSITIVISM

See Jurisprudence.